(25,224)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 941.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

THE GEIGER-JONES COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1916.

TRANSCRIPT OF RECORD.

Bill of Complaint—Filed November 17, 1915.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Bill of Complaint. No. 51.

The plaintiff, The Geiger-Jones Company, a corporation, complains of the defendants, Edward C. Turner, attorney general of the state of Ohio, and Harry T. Hall, superintendent of banks and banking of the state of Ohio, and says:

1. That the plaintiff, The Geiger-Jones Company, a corporation, is a corporation organized under the laws of the state of Ohio with its office and principal place of business at Canton, in the said state of Ohio; that the issued and outstanding stock of said corporation is $1,655,200.00, all of which has been fully paid up, and that it has an existing surplus of $285,000.00; that the general nature of the business in which said corporation is engaged and in which it is authorized to engage, as appears from its articles of incorporation, is that of buying and selling investment securities, its business consisting principally of buying and selling the stocks and bonds of industrial corporations; that as a corporation it has been since the year 1907 actively engaged in the marketing of the kinds of securities aforementioned, with the result that it has sold and there is now outstanding in the hands of persons to whom it has sold, securities amounting to from twenty million to twenty-five million dollars, par value; that the said securities so sold are those of corporations whose total outstanding securities amount to between fifty and sixty millions of dollars, of which the aforementioned twenty to twenty-five millions of dollars of securities is a part; that said The Geiger-Jones Company has a regular established clientage of approximately eleven thousand persons residing in the state of Ohio and other states; that the stockholders in

the plaintiff company consist of several hundred persons residing in the state of Ohio and in other states; that the securities above referred to as having been sold and disposed of by plaintiff consist of the securities of over twenty corporations organized and existing under and by virtue of the laws of Ohio and other states and foreign countries; that not one of the eleven thousand clients to whom the plaintiff has sold the securities above referred to has ever suffered or incurred any loss because of his investment in said securities; that the plaintiff in the course of its business has marketed and is now marketing the securities of Ohio corporations and citizens in other states of the United States and in foreign countries; that it has sold and is now selling the securities of citizens and corporations of other states and foreign states in the state of Ohio and in other states, and that the said plaintiff is and has been engaged in intrastate, interstate and foreign commerce.

2. The plaintiff avers that the legislature of the state of Ohio at the regular session of 1913 passed an act "To regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sale," which said act is contained in Volume 103 of the Laws of Ohio, pages 743 to 753, inclusive, which said act was duly approved by James M. Cox, governor of said state of Ohio at the special session of the Eightieth General Assembly, which began January 14, 1914, amended said law by the passage of an act entitled "To amend Sections 6373-1, 6373-2, 6373-3, 6373-4, 6373-5, 6373-6, 6373-7, 6373-8, 6373-9, 6373-10, 6373-11, 6373-12, 6373-13, 6373-14, 6373-15, 6373-16, 6373-24 of the General Code of Ohio to further regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio, and to prevent fraud in such sales, which said amendatory act was approved by the governor of said state on February 17, 1914, and filed in the office of the secretary of state on February 19, 1914, which said amendatory act is found in Volume 104 of Ohio Laws, pages 110 to 119, inclusive; that the legislature of the state of Ohio at the special session of 1914, which began July 20, 1914, amended said amendatory act as appears in part of an act entitled "An act to amend Sections 712, 714, 716, 724, 736, 742-3, 742-4, 742-5, 742-9, 742-16, 6373-16 and 12898 of the General Code relative to the duties of the superintendent of banks and banking as appears in Volume 105-106, pages 363 and 364, inclusive. Attached hereto and made a part hereof is a copy of all sections of said original act and said amendatory acts which now purport to be in force and which are unre-

pealed. Said copy is marked Exhibit A and is a copy of what is known as the Blue Sky Law and which will be found in Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio to which reference is hereby made.

3. The defendants and each of them pretending and assuming to act in virtue of the statutes aforesaid and without any right, authority or justification in law have threatened, and unless restrained, will immediately revoke the license granted to plaintiff to do business as a dealer in the securities aforesaid to the great and irreparable injury to this plaintiff and to the eleven thousand holders of said securities as well as the companies concerned therein, representing investments in excess of $50,000,000.00.

4. Said defendant, Edward C. Turner, attorney general of the state of Ohio, without authority or without justification in law, threatens to and will, unless restrained by this court, give to said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, a written certificate, opinion or recommendation advising and directing said defendant, Harry T. Hall, superintendent of banks and banking, aforesaid to revoke the license now held by this plaintiff; and said defendant, Edward C. Turner, threatens to and will cause said certificate, opinion or recommendation to become and remain a public document in the files of said superintendent of banks and banking and to cause the same to be published broadcast by the newspapers of the said state and country to the great and irreparable damage to this plaintiff and said eleven thousand security holders and to their irremedable wrong, all without warrant or justification in law; and said defendant, Edward C. Turner, attorney general of Ohio, has, without warrant or authority in law, already advised said defendant, Harry T. Hall, superintendent of banks and banking, that it will be his duty to follow the said recommendation or opinion or certificate of said attorney general and to cancel said license and said attorney general has advised said superintendent of banks and banking that he is and will be without discretion in the premises. The plaintiff further avers that said defendant, Harry T. Hall, superintendent of banks and banking, believing that he is bound by the opinion of the attorney general and that he is without discretion in the premises, will, in reliance thereon and in compliance therewith, without warrant of law, revoke said license unless restrained by order of this court.

5. The plaintiff avers that said act of the legislature of 1913, and said amendatory acts and each of them are

unconstitutional, invalid and void: (1) because they deprive the plaintiff of its right to sell in the state of Ohio valuable stocks, bonds and securities, which is deprivng it of its property without due process of law; (2) that they deny the plaintiff as well as all of said security holders aforesaid and the companies aforesaid the equal protection of the laws as guaranteed to it and them under the 14th amendment to the Federal Constitution; (3) that said acts impose a burden upon and practically amount to prohibition of interstate commerce, which is contrary to Section 8 of Article I of the Constitution of the United States; (4) because said acts attempt to place in the superintendent of banks and banking of the state of Ohio legislative, executive and judicial powers, which is contrary to Articles 1, 2, 3 and 4 of the Constitution of the state of Ohio; (5) because said acts delegate to the superintendent of banks and banking of the state of Ohio legislative and judicial powers, which is in violation of the Constitution of the state of Ohio, and (6) because said acts and each of them are in violation of Article 5 of the Constitution of the United States, in that they deprive the plaintiff and said eleven thousand holders of said securities of its and their property without due process of law.

6. The plaintiff avers that if said defendant, Edward C. Turner, attorney general of Ohio as aforesaid, is permitted to give said certificate, opinion or recommendation to said defendant, Harry T. Hall, superintendent of banks and banking of said state, or if said defendant, Harry T. Hall, superintendent of banks and banking, is permitted to act upon said certificate or to revoke said license, and if said defendants or either of them be permitted to give publicity to their proceedings herein referred to, irreparable injury will be done to the property rights of the plaintiff and to said eleven thousand security holders, their property will be depreciated in value and this plaintiff is without remedy to prevent the same save in a court of equity.

7. The plaintiff avers that if said defendants and each of them are permitted to proceed under pretense of enforcing said unconstitutional, invalid and void acts and statutes as they are attempting, are threatening and will do, unless restrained by this court, and if said license by revoked, this plaintiff will be prevented from conducting and prosecuting its said business free from the interferences of said officials acting under said void law; will be deprived of the profits arising from the operation and conduct thereof, and its hundreds of stockholders and

said eleven thousand security holders will suffer thereby and will be irreparably damaged and injured.

8. Plaintiff says that its assets consist principally of securities, stocks and bonds issued by the said corporations hereinbefore referred to, and that any action taken by said attorney general or said superintendent of banks and banking, even without warrant of law will necessarily, because of the very nature of the stock and bond business, affect the market value thereof, and that any proceedings by said attorney general or said superintendent of banks and banking, or a publication thereof, will, without reason and because of such unauthorized acts, cause irremediable loss and damage to said plaintiff and to the holders of the securities of these various companies hereinbefore mentioned.

9. Te plaintiff being remediless, save and except in a court of equity where matters of this kind are alone and properly cognizable, prays that the defendants, and each of them, be made parties defendant to this bill, and that proper process shall issue against them, and each of them; that a restraining order be issued by this honorable court enjoining, inhibiting and restraining the said defendant, Edward C. Turner, attorney general, from giving said certificate, opinion or recommendation to his said co-defendant, Harry T. Hall, superintendent of banks and banking; enjoining, inhibiting and restraining the said defendant, Harry T. Hall, superintendent of banks and banking, from acting upon such certificate, opinion or recommendation; and further restraining said Harry T. Hall, superintendent of banks and banking, from revoking, or attempting to revoke such license; enjoining, inhibiting and restraining said defendants, and each of them, from publishing or placing on the files any action, or the proceedings had or being had in connection with said license, or said certificate, opinion or recommendation, or the substance thereof, and enjoinng, inhibiting and restraining said defendants, and each of them, from attempting to act in virtue of or under favor of said unconstitutional, invalid and void statutes and pretended laws aforesaid, or from in any wise interfering with this plaintiff in the continuation of its business, as hereinbefore referred to; that upon a preliminary hearing an interlocutory injunction be granted declaring said acts and each of them of the legislature of Ohio invalid, unconstitutional and void; that at said preliminary hearing an interlocutory injunction be granted enjoining, inhibiting and restraining said defendants, and each of them, from doing any of the things hereinbefore threatened and complained of, and enjoining them from in-

terfering with, preventing, molesting or threatening the plaintiff in the sale or soliciting of the sale of stocks or other securities, as hereinbefore referred to, and from the peaceable and unmolested continuance of its business, and that upon the final hearing of this cause such interlocutory injunction be made perpetual, and that in the said restraining order and in the said interlocutory injunction, and by the terms thereof, the said defendants, and each of them, be enjoined from any further activities against this plaintiff in relation to said license or in the conduct of its said business, and for such other, further and general relief as under the facts and circumstances of this case this honorable court may see fit to grant or as to equity may seem meet and proper.

And for this the plaintiff will ever pray, etc.

The Geiger-Jones Company,
a Corporation.

E. N. Huggins,
Timothy S. Hogan,
Solicitors for Plaintiff.

M. B. & H. H. Johnson,
A. M. McCarty,
Of Counsel.

State of Ohio, County of Franklin, ss.:

This day personally appeared before the undersigned, a notary public in and for Franklin county, Ohio, Harry M. Geiger, who, after being first duly sworn, upon oath says that he is the president of the Geiger-Jones Company, being duly authorized in the premises; that he has read the said bill and knows the contents thereof, and that the facts and statements therein contained are true.

Harry M. Geiger.

Sworn to and subscribed in my presence by the said Harry M. Geiger on this seventeenth day of November, 1915.

[Seal.] Boyd B. Haddox,
Notary Public in and for the County and State Aforesaid.

"Exhibit A."

Blue Sky Law.

As Amended, 1915.

Sec. 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed "securities") evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided.

Sec. 6373-2. The term "securities," as used in this act, shall not be deemed to include conveyances of real estate; or, where the same have not been judicially declared invalid, and where, at the time of such sale, there is no default in payment of any part of the interest or principal of the same:

1. Mortgage bonds and notes (other than corporate bonds where more than fifty per cent. of the entire issue is not included in a sale to one purchaser) secured by a bona fide mortgage on real estate:

2. Securities of quasi-public corporations, the issuance of which has been authorized by the public service commission of this state;

3. The stock or obligation of any national bank, or of any bank, trust company or building and loan association, organized under the laws of this state and subject to examination and supervision by the proper authorities thereof.

The term "dealer," as used in this act, shall be deemed to include any person or company, except national banks, disposing or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a bona fide owner of the security and disposes of his own property for his own account;

(b) One who, in a trust capacity created by any law of the United States or of this or any other state or by judicial authority, lawfully disposes of any property embraced within such trust;

(c) A bank or trust company, organized under the laws of this state and subject to examination and supervision by the proper authority thereof, selling a security for a licensee, other than the issuer or underwriter thereof, at a commission of not more than two per cent., where such bank or trust company is not a regular dealer in securities;

(d) One, not the issuer, who disposes of securities to a licensee under this act or to a company which, as a part of its regular business, deals in or holds such securities;

(e) A pledgee, selling in the ordinary course of business, a security pledged to him as security for debt in good faith and not for the purpose of avoiding the provisions of this act;

(f) The issuer, organized under the laws of this state where the disposal in good faith and not for the purpose of avoiding the provisions of this act, is made for the sole account of the issuer, without any commission and at a total expense of not more than two percentum of the proceeds realized therefrom plus five hundred dollars and where no part of the issue to be disposed of is issued, directly or indirectly, in payment for patents, services, good will or for property not located in this state; provided that the president and secretary, or the incorporators if done before organization, of the issuer shall, prior to such disposal, file with the "commissioner" a written statement setting forth the existence of all such facts and that such issuer is formed for the purpose of doing business within this state.

As used in this act, the term "company" shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; "dispose of" shall be construed to mean "sell, barter, pledge or assign for a valuable consideration or obtain subscriptions for"; "issuer," the original issuer of the security; and, where the context demands it, words in the present tense include the future tense; in the masculine gender include the feminine and neuter gender; in the singular number include the plural, and in the plural, the singular number; the word "whoever" includes all persons, natural and artificial, principals, agents and employees; "and" may be read "or," and "or" "and".

Sec. 6373-3. Before such license shall be issued to any dealer, there shall be filed by him with the superintendent of banks, herein termed the "commissioner," together with a filing fee of five dollars, an application for such license, together with information, in such form as shall be determined by such "commissioner," setting forth:

(a) The names and addresses of the directors and officers if such applicant be a corporation or association and of all partners if it be a partnership, and of the person if the applicant be an individual, together with names and addresses of all agents of such applicant assisting in the disposal of such securities;

(b) Location of the applicant's principal office and of his principal office in the state, if any;

(c) The general plan and character of the business of said applicant, together with references which the "commissioner" shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners and agents.

If the applicant be a corporation organized under the laws of any other state, territory or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation certified by the proper officer of such state, territory or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement.

The applicant at the same time shall also file with said "commissioner" a duly executed written instrument, irrevocable, consenting that any action brought against such applicant, arising out of and founded upon the fraudulent disposal of such securities by him or his agents, may be brought in Franklin county, and that, in the event that proper service of process cannot be had upon such applicant in such county, service of process made therein by the sheriff of such county, by sending a copy thereof by registered mail, at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application or such other place as the applicant may thereafter designate in writing filed with the "commissioner," shall have the same effect as if personally made upon the applicant according to the laws of this state.

Sec. 6373-4. Notice of all applications for registration as a licensed dealer in such securities shall be published in a daily newspaper of general circulation in the city where the applicant's principal place of business in the state is located, or in the city of Columbus, if the appli-

cant has no such place of business in the state, and no such application shall be acted on by the "commissioner" until the expiration of one week from the date of such publication, but shall be acted upon within twenty days after proof of such application has been filed with him. If the "commissioner" be satisfied of the good repute in business of such applicant and named agents, he shall, upon the payment of an annual fee of fifty dollars, and an additional fee of five dollars for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon payment of such annual fee, unless revoked as herein provided. The expense of all publications provided for in this act shall be paid by the applicant for license. Pending a final disposition of such application the "commissioner" may grant temporary permission to such applicant to transact business as a dealer under this act. All such renewals shall be made as of the first day of January in each calendar year upon proper application therefor, filed not less than twenty nor more than sixty days next preceding such date.

Sec. 6373-5. Such license shall be taken out at the beginning of each calendar year, but it may be issued at any time for the remainder of such year, and in such case the annual fee shall be reduced four dollars for each expired month, but in no case shall it be less than ten dollars. Upon the payment of a fee of five dollars for each specified agent not named in such license the same may at any time be amended or supplemented to include such agent. Upon the written request of such applicant, accompanied by a fee of two dollars, such license shall be revoked as to any agent or agents of such applicant, and an amended license shall thereupon be issued for such applicant and his remaining agents; and thereafter the applicant shall not be bound by the acts of the agent whose license has been revoked. Notice of such amendments shall also be published as aforesaid.

Sec. 6373-6. Such "commissioner" may at any time revoke any such license, or refuse to renew the same, upon ascertaining that the licensee:

(a) Is of bad business repute;

(b) Has violated any provision of this act; or

(c) Has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions.

No dealer whose license has been revoked shall be relicensed within six months from the date of such revocation.

The "commissioner" shall at once lay before the prosecuting attorney of the proper county any evidence which shall come to his knowledge of criminality under this act.

Sec. 6373-7. At least five days before revoking or refusing to grant or renew a license, the "commissioner" shall send by registered mail to the licensee, at the address named in the application written notice of his intention so to do, specifying therein the reasons for such revocation or refusal.

Sec. 6373-8. Any one whose license shall be refused or revoked or to whom a renewal of license may be denied, may file, within thirty days thereafter, in the court of common pleas of Franklin county, a petition against the "commissioner," officially, as defendant, alleging therein, in brief detail, the plaintiff's qualifications to be licensed and praying for a reversal of the official action complained of. Upon service of summons upon said defendant, returnable within three days from its date, but otherwise made as in civil actions, he shall, within one week from such return day, file an answer, in which he shall allege by way of defense the grounds previously assigned in his notice to such applicant or licensee, and such other grounds as shall, in the meantime, accrue or be discovered. All allegations of the answer shall be deemed to stand denied without further pleading and, upon application of either party, the cause shall be advanced and heard without delay. Merely technical irregularities in the procedure of such "commissioner" shall be disregarded and the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of. The court's decision shall consult only the rights of the plaintiff and the protection of the public and the "commissioner" shall prosecute no proceedings to obtain a reversal, modification or vacation of a judgment rendered in favor of the plaintiff and in such event, shall forthwith issue the license applied for. A judgment sustaining the refusal of the "commissioner" to grant or renew a license shall not bar, after thirty days, a new application by plaintiff for a license, nor shall a judgment in favor of the plaintiff prevent such "commissioner" from thereafter revoking such license for any proper cause which may thereafter accrue or be discovered.

Sec. 6373-9. Before such licensee shall dispose of any of such securities, within this state, he shall file with such "commissioner," in such form as shall be determined by him, the following information concerning such securities, if issued by any company:

(a) The name, location of principal office of the issuer and the names of its officers and directors, or if a copartnership, the partners;

(b) A statement of the issuer, showing in general detail, the assets and liabilities, and capital stock of the issuer, as of a date as late as the close of its last fiscal year, and of its gross income, expenses and fixed charges, for one year last prior thereto, or for such time as the issuer has been in business, if less than one year;

(c) A pertinent description of such securities, and the purpose of said issue, and

(d) Unless the foregoing information be excused under the provisions of the following section, the approximate price at which the licensee purposes to dispose of such securities.

If the securities be of a taxing subdivision of any other state, territory, province or foreign government, and are not an obligation of the entire taxing subdivision and payable out of the proceeds of a general tax, there shall be filed the information required by paragraphs (c) and (d) of this section and, in addition thereto, a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the same is secured and that, to the best of his knowledge, there is no default in the payment of any part of the interest or principal of such securities and are no adjudications adversely affecting, or pending suits questioning the validity of the same.

Sec. 6373-10. The information required in the preceding section need not be filed:

(a) Unless required by the "commissioner," if the same has been filed by any other licensee; or

(b) If actual current sales of the securities, at prices quoted, shall have been, from time to time, for not less than six months next preceding such disposal, published in the regular market reports of the news columns of a daily newspaper of general circulation in this state; or

(c) Where there is a disposal of securities, the price paid or consideration rendered for which, in a single transaction, by one disposee, shall amount to five thousand dollars or more; or

(d) Where the securities disposed of are those of manufacturing or transportation companies, or of common carriers or other public utilities, issued and outstanding in the hands of bona fide purchasers for value, prior to March 1, 1914, where such companies were, on said date, and shall be, at the time of sale, actual going concerns, either directly or through lessees, and where there shall be at the time of sale no default in payment

of any part of the interest or principal of such securities; or

(e) Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by such "commissioner"; or

(f) Where the disposal is made for a commission of less than one percentum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted place of business in this state, regularly open for public patronage as such.

Sec. 6373-11. Every dealer, before or at the time of circulating the same, shall furnish to the "commissioner" one copy of each prospectus, circular or other document of like nature and of each advertisement circulated by him in connection with the sale of any securities concerning which information is required to be filed under the provisions of Sections 6373-9 and 6373-10 of the General Code.

Sec. 6373-12. No person or company shall, for the purpose of organizing or promoting any insurance company, or of assisting in the flotation of its stock after organization, dispose or offer to dispose, within this state, of any such stock, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language:

"No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of........per cent. of the amount actually paid upon separate subscriptions, or, in lieu thereof there may be inserted, '$........per share from every fully paid subscription,' and the remainder of such payments shall be invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be) and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority."

The amount of such commission, promotion and organization expenses shall in no case exceed fifteen per cent. of the amount actually received upon the subscription.

Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and

ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid.

Sec. 6373-13. Whoever, with intent to secure financial gain to himself, advises and procures any person to purchase any security and receive for such advice or services any commission or reward from the owner or salesman thereof, without disclosing to the purchaser the fact of his agency or his interest in such sale shall be liable to such purchaser for the amount of his damage thereby, upon tender of such security to, and suit brought against, such adviser, within one year subsequent to such purchase.

Sec. 6373-14. For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in Section 6373-16 of the General Code, which shall not be done until, together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in Section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of Section 6373-9 of the General Code, the following:

(a) A certified copy of the articles of incorporation or association of the issuer, its regulations and by-laws;

(b) Certified copies of all minutes of stockholders and directors relative to the issue of such securities;

(c) A sworn statement made by the president and secretary of the issuer, showing in detail the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment;

(d) Like certified copies of all contracts or agreements between the issuer and any underwriter of such securities, and, if disposed of by the issuer, all contracts and agreements relative to the sale and disposition thereof; and any such contracts or agreements made subsequent thereto shall be filed immediately upon the execution thereof;

(e) All contracts made between such underwriter and any salesman, agent or broker.

This section shall not apply where the issuance of the securities has been approved by the public service commission or like body of any state of the United States or any province of the Dominion of Canada, or where the

sale is made by or on behalf of an underwriter who, in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him and pays therefor, in cash or its equivalent, before attempting to sell the same, not less than ninety percentum of the price at which such securities are thereafter sold by him; nor where the securities are those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal mining or quarrying, and the whole or a part of the property upon which such securities are predicated is located within this state; nor of a real estate or building company all of whose property, upon which such securities are predicated, is located in this state; nor in the case of an issuer excepted under paragraph (f) of Section 6373-2, General Code; nor in cases where the filing of information is dispensed with under the provisions of paragraphs (b), (d), (e) or (f) of Section 6373-10, General Code.

The information required by paragraphs (d) and (e) of this section shall be for the information of the commissioner only, and shall not be disclosed by him except when lawfully required in a judicial proceeding.

Sec. 6373-15. No person or company, unless licensed in the manner and under the conditions applicable thereto hereinbefore provided for dealers, shall, within this state deal in real estate not located in Ohio of which he is not the actual and bona fide owner and unless the "commissioner" shall issue his certificate as provided in the following section, and prior to such issuance there shall, together with a filing fee of five dollars, be filed with the "commissioner" an application for such certificate, and a written statement of the applicant containing a pertinent description of the real estate the sale of all or a part of which is sought to be made, and the nature and source of the title of the owner thereto, and the amount or value and the nature of the consideration paid or allowed by him therefor, it shall, within this state, be unlawful:

(a) For any corporation, association or co-partnership doing business under any name other than the name or names of such person or of all the members of such association or co-partnership to sell any real estate not located in Ohio;

(b) For any person or company engaged in the business of dealing in real estate to sell or offer for sale any such real estate, the title to which is or is represented to the purchaser to be in the name of a corporation or unin-

corporated company, or of a person doing business under a fictitious name.

This section shall apply where the title to such property is held in the name of a trustee for any corporation or for any such described person or company; but it shall not be deemed to prohibit the disposal by an owner of his own property, in good faith and not for the purpose of avoiding the provisions of this act, where the transaction is not one of repeated transactions of a similar nature, performed as a part of the business of dealing in real estate; nor shall it be deemed to prohibit a railroad company having an immigration bureau or department from advertising either directly or through its accredited representatives, the fact that there are along its route lands for colonization or sale; provided that such advertising be not of specific tracts of real estate, and not for the purpose of avoiding the provisions of this act.

Sec. 6373-16. Said commissioner shall have power to make such examination of the issuer of the securities, or of the property named in the two next preceeding sections, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable. When in the discretion of the commissioner all or any part of the expense of such examination should be paid by the applicant for such certificate, such applicant shall deposit with the commissioner such sum of money as the commissioner may order, out of which said sum the commissioner shall pay that portion of the expense of such examination as the commissioner determines said applicant should pay. The commissioner shall render to the applicant an itemized statement of the expenditure and a proper record thereof shall be kept. And if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and that the issuer or vendor is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. But if it shall not affirmatively so appear he shall so notify the applicant, in writing, and of his refusal to issue such certificate. Such certificate shall be issued or refused within a reasonable time after the filing of the application therefor, which shall be within not more than 30 days from and after the applicant or certificate holder whose certificate has been revoked has fully complied with all requirement of this act precedent thereto; provided, that the commissioner may at any time revoke any such certificate issued by

him when he has reason to believe that the business of the holder thereof is being fraudulently conducted, or that such securities or other property are being disposed of upon grossly unfair terms, or, in the case of securities that the issuer thereof is insolvent. Such applicant shall have the same right of review of such finding as is given to a dealer by Section 6373-8. The fee provided for in this section shall not be required of an applicant who is licensed as a dealer.

Sec. 6373-17. Such certificate shall recite in bold type that the "commissioner" in no wise recommends such securities or other property; and no person or company shall advertise, in connection with the sale of such securities, the fact that such certificate has been issued unless such advertisement also contains in bold type a copy of such recital.

Sec. 6373-18. In addition to the liability now imposed by law, any person or company that, by written or printed circular, prospectus, statement or advertisement of any kind, shall offer for subscription or purchase any security, or receive the profits accruing from the disposal of securities so advertised, shall be liable to any person who, on the faith of such advertisement or document, acquires such security, for the loss or damage sustained by him by reason of any untrue statement contained therein, unless such person or company shall establish that he or it had no knowledge or notice of the publication of such advertisement prior to the transaction complained of, or had just and reasonable grounds to believe the statements thereof to be true. Wherever any corporation shall be so liable, the directors thereof shall also be, under like limitations, jointly and severally liable. Any such director, upon the payment of a judgment so obtained against him, shall be subrogated to the rights of the plaintiff against such corporation and shall have the right of contribution for the payment of such judgment, under like limitations, against any of his fellow directors. Lack of reasonable diligence to ascertain the fact of such publication or the falsity of any statement therein contained, shall be deemed to be knowledge of such publication and of the falsity of any untrue statement thereof. Any action brought against such director, based upon the liability hereby imposed, shall be brought within two years after the acquisition of the security by any person so damaged or after payment of the judgment for which contribution is sought.

Sec. 6373-19. If the issuer of such securities be a company incorporated, organized or formed to make any insurance named in subdivisions I and II, division III,

title IX of the General Code, the "commissioner," for all the purposes named in sections 14 and 16 of this act, shall be the superintendent of insurance of this state. In addition to the powers given to, and the duties prescribed to be performed by, such "commissioner," under said sections, the superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state.

Sec. 6373-20. Whoever knowingly makes any false statement of fact in any statement or matter of information required by this act to be filed with the "commissioner," or in any advertisement, prospectus, letter, circular or other document, containing an offer to dispose or solicitation to purchase, or commendatory matter concerning such securities or real estate, with intent to aid in the disposal of the same, or whoever knowingly violates any of the provisions of sections 12, 14 or 15 of this act, or for the purpose of aiding in the disposal of any security or real estate, knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, shall be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned in the penitentiary not more than one year or both; and whoever violates any of the other provisions of this act shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned in the county jail or workhouse not more than sixty days, or both.

Sec. 6373-21. In any prosecution brought under this act, the accused shall be deemed to have had knowledge of any matter of fact where in the exercise of reasonable diligence, he should, prior to the commission of the offense complained of, have secured such knowledge. Information and indictments under this act need not negative any of the exceptions enumerated in sections two, ten and fourteen hereof.

Sec. 6373-22. Nothing herein contained shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of this act, for the violation of any other statute or of any other provision hereof.

Sec. 6373-23. Nothing herein contained shall be so construed as to impair the obligation of prior contracts.

Sec. 6373-24. The superintendent of banks, as "commissioner" under this act, is hereby authorized to appoint

an assistant commissioner and such clerks as are actually necessary to carry out the provisions of this act and to fix their salaries; such appointments and salaries to be subject to the approval of the governor. Subject to the supervision of such "commissioner," the assistant commissioner may perform all the duties imposed upon, and have all the powers granted to such "commissioner" under the provisions of this act. All fees received hereunder by the "commissioner" shall be deposited by him with the treasurer of state upon the warrant of the auditor of state.

Index.

Motion for Temporary Restraining Order.—Filed November 17, 1915.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Motion for a Temporary Restraining Order.

Now comes the plaintiff herein, by his duly authorized attorneys, and moves the court for a temporary restraining order herein in accordanace with the prayer of the bill of complaint.

E. N. Huggins,
T. S. Hogan,
Solicitors for Plaintiff.

Motion for Interlocutory Injunction.—Filed November 17, 1915.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Motion for Interlocutory Injunction.

Now comes the plaintiff herein, by his duly authorized attorneys, and moves the court for an interlocutory injunction herein in accordance with the prayer of the bill of complaint.

E. N. Huggins,
T. S. Hogan,
Solicitors for Plaintiff.

Opinion of Judge Sater Granting Restraining Order.— Filed November 19, 1915.

United States District Court, Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, an Ohio Corporation, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of Such State, Defendants.

[No. 51.]

On Application for Restraining Order.

Sater, District Judge:

The plaintiff applies for a restraining order against the defendants to prevent them from proceeding under the act of 1913 of the General Assembly of Ohio (O. L., Vol. 103, pp. 743-753), known as the "Blue Sky Law," and the act of January 14, 1914 (104 O. L., 110), to amend certain sections of the General Code to regulate the sales of bonds, stocks and other securities, and of real estate not located in Ohio, and to prevent frauds in such sales.

The plaintiff, an Ohio corporation, is engaged in buying and selling investment securities, principally stocks and bonds of industrial corporations. The bill avers that several hundred persons hold stock in the plaintiff company, that it has sold securities of more than twenty corporations to 11,000 different persons, and that it is engaged in interstate and foreign commerce, in that its business extends and has extended not only throughout the state of Ohio, but into other states. The bill must be construed as an entirety. Its third paragraph charges broadly that "the defendants and each of them pretending and assuming to act in virtue of the statutes aforesaid and without any right, authority or justification in law have threatened, and, unless restrained, will immediately revoke the license granted to plaintiff to do business as a dealer in the securities aforesaid, to the great and irreparable injury to this plaintiff and to the 11,000 holders of said securities as well as the companies concerned therein, representing investments in excess of $50,000,000." Paragraph four avers that the attorney general, without authority or justification in law, threatens to give his co-defendant Hall and will give to him, unless restrained by the court, a written certificate or opinion or recommendation advising and directing him to revoke

the plaintiff's license to do business, and threatens to cause and will cause the same to remain a public document in the files of his co-defendant and to be published broadcast by the newspapers; that he has already advised Hall that it will be the latter's duty to observe such opinion, for the reason that Hall is without discretion in the premises; and that Hall, believing himself bound by such opinion and to be without the right to exercise his own discretion in the enforcement of such acts, will, in reliance thereon and compliance therewith, without warrant of law, revoke plaintiff's license, unless restrained from so doing. The sixth and seventh paragraphs charge that, if such opinion is given, and acted upon by Hall, and if the defendants, or either of them, give the above-mentioned publicity to their proceedings, irreparable injury will be done to the property rights of the plaintiff and the 11,000 security holders whose property will be depreciated in value without ability on the part of the plaintiff to prevent such injury save through the interposition of the court; that the plaintiff will be prevented from prosecuting its business free from the interference of such officials acting under such unconstitutional law, and will be deprived of the profits arising from the conduct of such business; and that its stockholders and security holders will be irreparably damaged. The two acts in question are said to be unconstitutional, invalid and void for six reasons, which are specifically enumerated in the bill. The prayer is that the attorney general be restrained from giving such opinion, that both defendants be restrained from publishing and filing the same and their proceedings in connection therewith, and from interfering with the plaintiff's continuation of its business. It will be seen from the foregoing that the broad averment made in the third paragraph is by subsequent specifications restricted to the charge on the part of the attorney general of a purpose as regards him to give an opinion to his co-defendant Hall, advising and directing Hall to cancel the plaintiff's license, which opinion will become one of the instruments on file in the banking department, and to cause it to be published broadcast in the newspapers. It is this contemplated action of the attorney general against which relief as to him is sought.

Section 341, G. C. Ohio, provides that the attorney general, when so requested, shall give legal advice to a state officer * * * in all matters relating to his official duties. It is not averred that the attorney general has been requested by his co-defendant to give his opinion on the acts in ques-

tion, but, as an official is presumed to act within the law and to perform his duties as prescribed by the law, it must be presumed that he was called upon by Hall for an opinion. The superintendent of banks and banking is an appointive state officer. Sec. 718, G. C., recognizes him as an officer in that he is required to seal "with the seal of his office" every instrument executed by him in pursuance of the authority conferred upon him by law. He is also made such by the application of the definition of an "officer" adopted in State vs. Wilson, 29 Ohio St., 347. It is not charged and may not be presumed that the attorney general is about to give a dishonest opinion, or to act corruptly, maliciously, or for a fraudulent purpose, or from any sinister motive. If he is about to act under a valid law, the court may not inquire as to his motives. In Mechem on Public Office and Officers, Sec. 9990, it is said:

> "In determining the cases in which a public officer may be restrained by injunction, it may first be noticed that the writ will not be granted to restrain a public officer from acting where he is proceeding by the authority and in pursuance of the law regulating his powers and duties, unless such law be unconstitutional or otherwise invalid. What a valid law authorizes the officer to do, the courts will not undertake to prevent, even though it be alleged that the officer is actuated by unworthy motives."

It is not charged that the attorney general is about to mandamus Hall to compel him to act under the enactment in question, or that he is about to enjoin the plaintiff from conducting its business, or to commence any criminal action or actions under such enactments, or to cause the same to be commenced, by any duly authorized prosecuting officer. Under the facts presented by the pleading, may this court enjoin him from performing the acts of which complaint is made?

The averments of fact contained in the bill must, for the purposes of this hearing, be treated as true. So treating them, the attorney general will advise Hall that the laws in question are valid and that for want of discretionary power to do otherwise he (Hall) must proceed to enforce them by revoking the plaintiff's license. The courts will not be bound to adopt any views expressed by the attorney general in his threatened opinion, U. S. vs. Black, 128 U. S., 40, 47, nor will Hall be required to follow his directions unless he chooses to do so, Dodd vs. The State, 18 Ind., 56, 67. This fact, however, may be put aside, for the reason that it is averred that Hall

will follow the attorney general's direction. The enforcement of the law by a revocation of the plaintiff's license, which is the only manner of enforcement of which complaint is made, is cast upon Hall by section 6 of the act of 1913, and by section 6373-6 of the act of 1914. If he should proceed under the advice and direction given him by the attorney general, the latter would not be further called upon to act—in any event, might not be called upon further to act or advise—unless the plaintiff, after the cancellation of its license, should appeal to the courts for relief, as it may do under section 8 of the act of 1914, or section 6373-8 of the act of 1914. Accepting the averments of the bill to be true, as must be done, the views of the attorney general as to the validity of the acts in question, as to the extent of Hall's powers and as to his obligations to cancel plaintiff's license, have already been made public. In order to plant its case in court, the plaintiff of necessity or by its own election promulgated such views. Whatever injury will result to it, its stockholders and security holders by reason of such promulgation has already been done, unless the averred intention of the attorney general to cause his views to be published broadcast throughout the state and country will increase such damage. The charge as to such purpose on his part may, however, be regarded as a negligible averment. The business of his office and that of Hall is public. Any newspaper is at liberty to inspect and publish any opinion emanating from the attorney general. Indeed, the opinions of that officer are published at the state's expense in bound volumes as a part of his annual report, for use and distribution. The subject-matter toward which his proposed opinion is to be directed and the great interest of the public, as well as of the plaintiff's investors and stockholders, are such as will necessarily largely attract public attention and induce widespread publication. It is surmised that the public press will voluntarily give such notice of the opinion, if filed, that any effort the attorney general may make to give increased publicity to his utterances will not, in all probabilities, bring them to any greatly increased number of our citizens.

The books abound in cases in which state officers, and among them attorney generals, have been enjoined from enforcing unconstitutional laws. The "Blue Sky Law" of West Virginia was held unconstitutional in Bracey vs. Darst, 218 Fed. Rep., 482, in a suit against the attorney general of that state and other state officers—the charge being that they were about to prosecute criminal proceedings against alleged offenders; that of Iowa met a

similar fate in Wm. R. Compton Co. vs. Allen, 216 Fed. Rep., 537, in which the attorney general was one of the defendants; that of Michigan was invalidated in Alabama & N. O. Transp. Co. vs. Doyle, 210 Fed. Rep., 173, in which the attorney general was by the act then under consideration constituted a member of the securities commission. In Ex Parte Young, 209 U. S., 123 (13 L. R. A. (N. S.), 932), in which a Minnesota rate act was held to be unconstitutional, it appears that the attorney general and certain other state officers were enjoined by the lower court from enforcing the act and that in disregard of such injunction the attorney general filed a suit in mandamus in one of the state courts to compel the observance of the law by an alleged violator. A rule to show cause why he should not be punished for contempt issued against him. The Supreme Court held that the rule to show cause had been rightfully issued. In Louisville & N. R. Co. vs. Bosworth, 209 Fed Rep., 380, involving a Kentucky statute relating to an assessment of railway property for taxation, the attorney general and other state officers were held properly to be made defendants, and in Little vs. Tanner, attorney general of the state of Washington, 208 Fed. Rep., 605, it was held that the attorney general and the prosecuting attorney of a county were so far charged under the state statutes with the execution of the criminal laws as to make them proper parties defendant to a suit to enjoin the enforcement of a state statute whose violation was punishable as a criminal offense. Many other cases might be cited. The rule is well settled that a federal court may enjoin the attorney general of a state, whose general duty is to enforce the state statutes, from proceeding to enforce, against persons affected, a state statute which violates the federal constitution, such proceeding being not prohibited by the provision of the federal constitution, forbidding the maintenance of actions against a state. In the Young case it was said (p. 159):

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainant is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state officer in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the federal constitution, the officer in proceeding

under such enactment comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official and representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from a responsibility to the superior authority of the United States."

In the same case it was further said (pp. 155, 156):

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act violating the federal constitution, may be enjoined by a federal court of equity from such action."

The same case is also authority for the doctrine that a federal court, in which is first raised the question of the validity of a statute under the federal constitution, has a right to decide that question to the exclusion of the state courts, and may enjoin criminal proceedings subsequently commenced under such statute in the state court until its duty is performed. From this it follows that inasmuch as this court has acquired jurisdiction to determine the validity of the Ohio "Blue Sky Law," it will have the right to decide that question to the exclusion of the state courts, and that should a state officer, while this case is pending, attempt either civil or criminal proceedings in the state courts to enforce such law, he could, on a proper presentation, be enjoined. Attention has been called to the above announcements of the law by the highest court of the land on account of the bearing which they have on the question as to whether the attorney general shall be restrained in the present instance or not. It is said in High on Injunctions, Sec. 1329a, that "A federal court sitting in equity may enjoin officers of a state from proceeding to execute or from otherwise doing acts under an unconstitutional law of the state where the attempted enforcement of the invalid statute will result in irreparable injury to the plaintiff for which there is no adequate remedy at law." The attorney general's opinion will, under the averments of the bill, set the machinery of the "Blue Sky Law" into operation. His opinion, however, will be about such law and not under it. His opinion will be rendered not under the alleged un-

constitutional laws, or either of them, but under Section 341, G. C., which is clearly a valid enactment. He is about to act in the discharge of a statutory duty. His views as to the validity of the enactment in question may be erroneous, but it is not illegal for him to entertain such views. Action must be taken by Hall, if taken at all. If Hall should act and the plaintiff should resort to the state court to reverse such action, and the attorney general as Hall's counsel should then become a participant, or, if Hall should refuse to act and the attorney general should then endeavor to compel him to do so, or, if the attorney general by a civil or criminal proceeding should seek the enforcement of such laws, he may then undoubtedly be restrained by this court, should it believe the law to be unconstitutional. Inasmuch only as he will merely advise about the laws and will not act under them, but under Section 341, and, as it is sought to enjoin him from saying, if his opinion is filed, what everybody now knows, he will say and what the plaintiff has already (although of necessity) publicly divulged, and what cannot, as it seems to me, appreciably enhance the damage, if any, which has already been occasioned, I am constrained to hold that the situation does not now exist which calls for the restraining action of this court. Insofar as cases have come under my observation in my somewhat hurried investigation, the instances in which an attorney general was restrained are those in which his position was that of a principal actor and not of a mere adviser of others as to what their duties might be. Whether the attorney general may command or should merely advise Hall is not a question which need be decided now, if ever, by this court.

Whether Hall should be enjoined must be determined by the ruling in Blount vs. Societe Anonyme Du Filtre, 53 Fed. Rep., 98. In that case Judge Jackson said:

> "The object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs, and according to the course and principles of courts of equity. The prerequisites to the allowance and issuance of such injunctions are that the party applying for the same must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant, which will seriously or irreparably injure his rights under such title, unless restrained. The legal discretion of the judge or court in acting upon applications for provisional injunctions is largely controlled

> by the consideration that the injury to the moving party arising from a refusal of the writ, is certain and great, while the damage to the party complained of, by the issuance of the injunction, is slight or inconsiderable."

From the cases cited by him, the following is gleaned: It is not necessary that it should now be decided upon the merits that the enactments in question are unconstitutional and that the plaintiff must ultimately prevail. The court must see that the matters of which complaint is made are a proper subject of investigation, that there is a substantial and real question to be decided and that property rights are affected, but it is not necessary that it should satisfy itself to a certainty of the existence of such rights. It is sufficient if a fair question is raised as to their existence. The court will also consider whether interim interference on a balance of convenience or inconvenience to one party and to the other is or is not expedient. The Supreme Court in Georgia vs. Braiseford, 2 Dall., 402, said:

> "In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated without the special interposition of the court."

The doctrine of the Blount case was approved and applied by the Circuit Court of Appeals in City of Grand Rapids vs. Warren Bros. Co., 196 Fed. Rep., 892. Tested by the foregoing, a restraining order may go against Hall, to prevent him from revoking or attempting to revoke the plaintiff's license and from taking any action in that behalf, and from enforcing or attempting to enforce any opinion which the attorney general may deliver to him concerning the plaintiff's operation under the acts in question, and from interfering in any wise with the plaintiff's continuation of its business. The restraining order will continue in force until the hearing and determination of the application for an interlocutory injunction, which hearing will be at Cincinnati on November 27, 1915, at 10 o'clock a. m.

Entry Granting Restraining Order. — Filed November 22, 1915.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Restraining Order.

This 19th day of November, A. D. 1915, came the plaintiff in the above entitled suit, by its attorneys, and presented to undersigned district judge of the United States Court for the Southern District of Ohio, Eastern Division, its bill of complaint duly verified, and made application to the said judge for an interlocutory injunction enjoining, inhibiting and restraining the said defendants from enforcing or attempting to enforce the acts of the General Assembly of the state of Ohio referred to and mentioned in the bill of complaint, on the ground that the same are unconstitutional, null and void, and at the same time moved the judge for a restraining order prohibiting, enjoining and restraining the said defendants from taking any further proceedings under and by virtue of said acts, or from doing the things complained of in said bill of complaint, and the judge being satisfied that this is a proper case for a temporary restraining order, doth adjudge, order and decree that no temporary restraining order issue against the defendant, Edward C. Turner, attorney general of Ohio, and that the defendant, Harry T. Hall, as superintendent of banks and banking of the state of Ohio, be restrained from attempting to enforce or enforcing the provisions of said acts, or from interfering with the business of the plaintiff, or from giving publicity to any of the things complained of in said bill of complaint, until a hearing upon such application for interlocutory injunction can be arranged and had before three judges, as provided for in Section 266 of the Judicial Code of the United States; the restraining order herein will continue in force until the hearing and determination of the application for an interlocutory injunction, which hearing will be at Cincinnati on November 27, 1915, at 9:30 o'clock a. m.

It is further ordered that the plaintiff serve upon the defendant above named a copy of the bill of complaint, and that the clerk of this court cause to be delivered to the said defendant a copy of this restraining order.

J. E. Sater,
District Judge.

Entry Submitting Case.—Filed November 27, 1915.

The Geiger Jones Company
vs.
Edward C. Turner, Attorney General of the State of Ohio, et al.
[No. 51.]

This day this cause came on for hearing to the court upon the pleadings, and was argued by counsel for the parties, Messrs. M. B. Turner and T. S. Hogan for the complainants, and E. C. Turner, attorney general, for the defendants, and was submitted to the court, whereupon the court took said cause under advisement and same is continued until the further order of the court in the premises.

Memorandum Opinion.—Filed February 10, 1916.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

William R. Rose and The RiChard Auto Manufacturing Company, a Corporation Organized Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

On Application for Temporary Injunction.

Before Warrington, Circuit Judge, and Sater and Hollister, District Judges.

Sater, District Judge:

The constitutionality of the so-called "blue sky" law of Ohio (Secs. 6373-1 to 6373-24, General Code, 103 Ohio L. pp. 743-753, 104 Ohio L. pp. 110-119, 105-106 Ohio L., pp. 363-364) is assailed in each of the above mentioned cases, which, for convenience, are considered together. Statutes of a kindred character have in learned opinions been declared invalid by federal courts sitting in Michigan (Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. Rep. 173, Halsey & Co. v. Merrick, not yet reported), Iowa (Compton v. Allen, 216 Fed. Rep. 537), West Virginia (Bracey v. Darst, 218 Fed. Rep. 482), and South Dakota (Sioux Falls Stockyards Co. v. Caldwell). The last named case, which is unreported, was decided by Sanborn, Circuit Judge, and Munger and Elliott, District Judges. Although a consideration of the act will involve a reiteration of principles already ably and convincingly stated, it is thought advisable to review it in part, at least,—a task rendered difficult on account of the

numerous exceptions to its general provisions, and, in some instances, of exceptions to such exceptions.

The Geiger-Jones Company, an Ohio corporation, is engaged in buying and selling in Ohio and other states, stocks and bonds principally of industrial corporations, domestic and foreign. It seems to prevent the revocation of the license heretofore granted it to transact such business and the threatened enforcement of the law against its continued prosecution of the same. Coultrap, a citizen of the state of Pennsylvania, and an agent of the Geiger-Jones Company, is the owner and holder of and a dealer in stocks of certain Ohio corporations and conducts his business in part by mail and in part by personal visits to the state. He charges that the revocation of the license of his employer will operate as a cancellation of his authority and that the contemplated enforcement of the statute will interrupt and destroy his business. Rose was heretofore arrested, indicted and convicted in one of the state courts for violating the act by selling the stocks and bonds of industrial concerns, and, particularly, the stock of his co-plaintiff, a West Virginia corporation, and is now awaiting sentence. Both he and The Richard Auto Manufacturing Company allege that the enforcement of the statute by the defendants named in their bill will prevent Rose from prosecuting his business of selling securities and his co-plaintiff from completing its organization and capitalization for the manufacture of automobiles. Briefly stated, the validity of the act is assailed on the grounds that (1) it is violative of the commerce clause of the federal constitution; (2) it is constitutionally obnoxious in that it denies plaintiffs of property without due process of law and the equal protection of the laws; (3) it delegates legislative and judicial power to an executive officer, in violation of the state constitution; and (4) it is a law of a general nature but does not operate uniformly throughout the state, as required by Section 26, Article 2, of the state constitution. If the act be unconstitutional, each of the plaintiffs is, as he must be, within the class whose constitutional rights are invaded. Standard Stock Food Co. v. Wright, 224 U. S. 540, 550. The prayer of each bill is for general as well as specific relief.

The act, which is entitled, "An act to regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales," prohibits, under severe penalties, the disposition of all securities subject to its provisions, without discrimination as to and regardless of their value, unless authority so to do is first obtained from the superintendent of banks

(termed the commissioner). The term "dispose of" is broadly construed to mean, "sell, barter, pledge, or assign for a valuable consideration or obtain subscriptions for." The first section, 6373-1, in comprehensive language declares that, except as otherwise provided in the act, no dealer may within the state dispose of or offer to dispose of any stocks, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all termed "securities") evidencing title to or interest in property issued or executed by any private or quasi-public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without being first licensed so to do. Promissory notes are not within the terms of the act, as was the case in the original Michigan statute. A limited number of other securities are also excluded from its provisions. The inclusive character of the act extends not only to "securities" coming within its provisions, but also to the persons subject to its exactions, prohibitions and penalties, as is evidenced by its definition of the terms "dealer" and "company," the former embracing "any person or company" and the latter "any corporation, copartnership or association, incorporated or unincorporated, whenever and wherever organized." The term "dealer" does not, however, include national banks or any company engaged in the marketing or flotation of its own securities or any stock-promoting scheme, although such company and scheme are required to obtain the certificate of the commissioner mentioned, and must abide by all the provisions contained, in Sections 6373-14 and 6373-16. A restricted number of other persons, natural and artificial, having occasion to dispose of securities, are also excluded from the classification of dealers. An "issuer" is defined to be an original issuer.

The act must be sustained unless it can be clearly shown to be in conflict with some constitutional provision. The question as to its wisdom was for the determination of the legislature; with that the court is not concerned. If the power under the federal constitution to enact it is absent, it is unimportant how wise, necessary or beneficent it may be, for it is then necessarily void because in conflict with the organic law of the land. Rail & River Coal Co. v. Yaple, 214 Fed. Rep. 273, 279, 280; Alabama & N. O. Transp. Co. v. Doyle, 176; Bracey v. Darst, 491, 492; Board of Health v. Greenville, 86 Ohio St., 1, 20; State v. Toledo, 48 Ohio St., 112, 132, 133.

If there are separate and independent unconstitutional provisions in the statute, which may be rejected,

and the rest of the act be permitted to stand and have effect according to the legislative intent, the valid portions must be upheld. But if an unconstitutional element pervades the entire statute as an inherent and essential part, it must fail as an entirety. In such a case it does not avail that the officer charged with the execution of the law may not enforce it according to its terms, but only as he may deem wise and expedient. Assent cannot be given, under such circumstances, to the proposition that although a statute may authorize the accomplishing of an unconstitutional purpose, it must, nevertheless, be presumed that it will, in fact, only be used to accomplish what can be done in accordance with the constitution. Taylor v. Com'rs., 23 Ohio St. 22, 33, 34; Alabama & N. O. Transp. Co. v. Doyle, 181; Bracey v. Darst, 491, 492; People v. Warden, 144 N. Y. 529, 539.

Because a certificate of stock is only evidence of the ownership of shares, the interest represented by them being held by the company for the benefit of the true owner (Citizens Sav. & Tr. Co. v. Ill. Cent. R. R., 205 U. S. 46, 57; Bank v. Mfg. Co., 67 Ohio St. 306, 314), it does not follow, as defendants' counsel contend, that such certificate is of less value than an unprinted sheet of paper of corresponding size and quality, and that it cannot therefore be a subject of interstate commerce. If it be but written evidence of an interest in corporate property, the same may be said of notes and bills, which are mere evidence of indebtedness on the part of individuals or corporations that issue them. In Merritt v. American Steel-Bars Co., 79 Fed. Rep. 228, 235, C. C. A. 8, in speaking of stock certificates, it was said that:

> "In the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

In Ohio a stock certificate is so far property that it may be seized by an officer making an attachment or levy. Sec. 8673-13, G. C.

A state law which, in its essentials, is a legitimate exercise of the police power, is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected; but, if such law directly burdens such commerce, although expressed to be a regulation under the state police powers, it must be held to be unconstitutional, for the reason that the power to regulate commerce between the states is vested in Congress.

Arnold v. Yanders, 56 Ohio St. 417, 421; Re Oscar Julius, 4 Ohio C. C. (N. S.), 604, 609; Mugler v. Kansas, 123 U. S. 623, 661; Austin v. Tennessee, 179 U. S. 343, 344.

Utterances emanating from the Supreme Court and express rulings by lower federal courts establish beyond all reasonable controversy that stock and bonds, securities whose disposition is subject to the provisions of the act, are articles of legitimate interstate commerce. Bracey v. Darst, 495, 496; Compton v. Allen, 546. Sales of them as between the states and their transmission from one state to another, whether through the mails or the instrumentality of common carriers, constitute interstate commerce. Sales may be and are effected by telegraph, telephone, correspondence, traveling salesmen and the issuers or investment companies directly or through their local or branch houses. The securities may be delivered by such salesmen or branch houses at the times sales are made or subscriptions taken, or by the issuers or investment companies by means of any of the known and usual agencies for transmitting such instruments from one state to another.

Whether interstate transactions in the securities whose disposition is within the purview of the act directly burdens interstate commerce must be determined by testing its provisions by the federal constitution. The act (Sec. 6373-3) requires as a condition precedent to the authorization and right of an applicant to do business in the state that such applicant shall submit, with a filing fee of five dollars, to the commissioner, (a) the names and addresses of the applicant's directors and officers, if the applicant be a corporation or association, and of all partners, if it be a partnership, and of the individual, if it be such, and also the names and addresses of all agents of such applicant, assisting or about to assist in the disposition of securities; (b) the location of its principal office without and within the state, if it have both; and (c) the general plan and character of its business, and references as to its suitability to transact such business, which references the commissioner "shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant's directors, officers and agents." If the applicant be a foreign corporation, having its principal place of business beyond the boundaries of the state, it must also file a duly certified copy of its articles of incorporation, regulations and bylaws, and, if it be an unincorporated association, a certified copy of its articles of association or deed of settlement. Every applicant must also submit to the commissioner an irrevocable written consent to litigate in the

courts of Franklin county only any action brought against him on account of any fraudulent disposal of securities by him or his agents, and also to be bound by service of process made personally or by registered mail. Notice of all applications for registration as a licensed dealer in securities must be published at the expense of the applicant in a daily newspaper of general circulation, and a further payment of an annual fee of fifty dollars is exacted should a license be issued. An amended license is necessary whenever the name of an agent is added to or stricken from the original, a payment of five dollars being exacted in the first instance and of two dollars in the latter. Notice of each amendment to the license must be published at the licensee's expense. The commissioner may at any time revoke any license or refuse to renew the same upon ascertaining—the manner of which is not stated—that the licensee is of bad business repute, has violated any provision of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions. He is required to give at least five days' notice of his intention to revoke or to refuse to renew or grant a license, but the licensee or applicant, as the case may be, is not accorded a hearing. Following the refusal or revocation of a license, the applicant or licensee, as the case may be, may contest in the Franklin county court the correctness of the commissioner's ruling, but must assume the burden of disproving the grounds assigned as the basis of his official action, and must also meet any additional reasons which the commissioner may plead in justification.

Notwithstanding the granting of a license to an applicant, it may not dispose of any given securities until it has also filed, unless excused by the commissioner from so doing, a further statement (Sec. 6373-9) touching the issuer of such securities, if the issuer be a company, setting forth (a) its name and the location of its principal office and the names of its officers and directors, or, if it be a co-partnership, the names of the partners; (b) a general detailed showing of its assets, liabilities, and capital stock, as of a date not later than the close of the last fiscal year, and also of its gross income, expenses and fixed charges for the year last prior thereto, or for such other time as the issuer has been in business, if that time be longer than a year; (c) a pertinent description of such securities and the purpose of their issue; and (d) the approximate price at which the licensee proposes to dispose of them. The exemptions from the filing of the information called for by such section which the statute

permits the commissioner to grant are enumerated in Sec. 6373-10. In most instance they are so qualified as to relieve but a limited number of licensees and introduce a fatal inequality as regards the protection of the laws guaranteed by the fourteenth amendment.

The statute further provides that no issuer or underwriter, nor any person or company acting in behalf of either (Sec. 6373-14), shall, within the state, for the purpose of organizing or promoting any company or of assisting in the flotation of its securities, dispose or attempt to dispose of any such securities until the commissioner has issued a certificate permitting such to be done, the granting of which must be subsequent to the issuer or underwriter filing an application (except in certain instances which need not now be noted), with a fee of five dollars, containing the information required by paragraphs (a), (b), (c) and (d) of Sec. 6373-9, a certified copy of the issuer's articles of incorporation or association, regulations and by-laws, of all minutes of stockholders and directors relative to the issuance of such securities, of any contracts which have been made between the issuer and its underwriter of such securities (copies of all such subsequent contracts also to be filed when made), and of all contracts between any underwriter and any sales agent or broker, and also a sworn statement made by the president and secretary of the issuer showing in detail the items of cash, property, services, patents, good will, and any other consideration for which such securities have been or are to be issued in payment. The commissioner (Sec. 6373-16) may, as he deems advisable, examine the issuer of such last named securities at any time, both before and after his grant of the certificate named in Sec. 6373-14. In the exercise of his discretion, he may require all or any part of the expense of such examination to be borne by the applicant, who is compelled to deposit with him in advance for such purpose whatever sum he may order. The applicant receives an itemized statement of expenditures made, but this follows the conclusion of the examination. If the commissioner finds that the applicant has complied with the law, is not fraudulently conducting its business, is not proposing to dispose of its securities on grossly unfair terms and is solvent, a certificate authorizing the disposal of such securities shall issue, providing, except in case of a licensed dealer, a fee of ten dollars be paid, but, if the commissioner does not affirmatively so find, the certificate must be refused. It must be issued or denied within a reasonable time after application for it is made, which time shall be within thirty days after the

applicant or certificate holder, whose certificate has been revoked, has fully complied with all the requirements of the act, but as the commissioner is the sole judge of what constitutes compliance, and as the examination, especially of large concerns, would in some instances be prolonged and at times have to be conducted at distant points in this or another country, the issuing of a certificate may be delayed indefinitely and beyond the thirty day period. After the applicant is authorized to proceed with its proposed business, the commissioner may still revoke its certificate and deny it the privilege of continuing to dispose of the securities in question, if he has reason to believe that the certificate holder's business is fraudulently conducted, or that the securities are disposed of upon grossly unfair terms, or that the issuer is insolvent, the right to review his action being again restricted to the Franklin county court. Whether such "reason to believe" shall be the result of an orderly examination of the issuer's conduct and affairs, or be otherwise acquired, does not appear.

Violation of the act constitutes a misdemeanor or felony, regard being had to the character of the offense, and is visited by a fine or imprisonment, or both.

In International Text Book Co. v. Pigg, 217 U. S. 91, and Buck Stove Co. v. Vickers, 226 U. S. 205, 213-216, a Kansas statute, akin to the Ohio act, but less drastic, was held to impose a direct burden on legitimate interstate commerce and to be violative of the commerce clause of the federal constitution not only on account of the license required as a condition precedent to the right to transact a lawful business, but because it is not competent for a state legislature to prescribe, as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock, authorized and paid up, and its par and market value, as to its assets, liabilities, officers, trustees, directors, manager, and stockholders, with a showing of the stockholdings of each of the latter and the amount paid on his holdings, and the post-office address of all of such above named persons. A quite similar but (as regards the parties at whom it was aimed) a more comprehensive statute in that it ran not only against express or transportation companies incorporated by any foreign government, but, like the present act, also against any association or partnership acting under the laws of any foreign government, was likewise denounced in Crutcher v. Kentucky, 141 U. S. 47, in a well reasoned opinion which is freely quoted in the Pigg case. The draughtsman of the act here in question, un-

wittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above named cases, and added others equally, if not more, obnoxious. The burdens which it imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable. The enforced suspension from all business activity for a period of thirty days, imposed by the original Michigan act, was held to be a fatal "30-day paralysis." In the later decision rendered by the same court (Halsey & Co. v. Merrick) the subsequent act of that state was overthrown, notwithstanding the absence of such restrictive provision. In the present act the prohibition from the transaction of business must extend for a week, and possibly twenty or thirty days, or more; it therefore offends against the constitution quite as much as the first of the Michigan acts.

The act must be further tested by its effect upon the citizen's right to pursue a lawful calling. The natural right to life, liberty and the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the public welfare, health or prosperity. But, however viewed, the act transcends the legitimate exercise of the police power and violates the due process clause of the constitution. There is a fundamental distinction between what Mr. Justice Bradley termed, in Butchers Union Co. v. Crescent City Co., 111 U. S. 746, 763, the ordinary occupations and pursuits of life, forming the large mass of industrial avocations which are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand, and the kinds of business and transactions which are affected by a public interest or arise from public grant or exist by public sufferance. Of this latter class are the liquor traffic, grain elevators, innkeepers, warehouses, itinerant peddlers, insurance, motion picture shows, concerns exercising public franchises, and the like, all of which it is competent for the state law-making power to regulate and within proper bounds subject to executive license and control, as the interests of society may require. To the former class, with which alone we are now dealing, belongs the right in good faith to buy and sell securities and to fix their price by agreement, either in individual transactions or in the course of repeated and successive transactions of a similar char-

acter, a right which, when so exercised, is both property and liberty and which cannot be made subject to either executive grant or denial. City of Cleveland v. Construction Co., 67 Ohio St. 197, 219. In Allgeyer v. Louisiana, 165 U. S. 578, 589, it was said that the liberty mentioned in the fourteenth amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." If an issuer or owner of or dealer in securities issued in good faith and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal or of offering them for disposal, he is deprived not only of his property, within the meaning of the constitution, by taking from him one of the incidents of ownership (City of Chicago v. Netcher, 183 Ill., 104, 110), but also of his liberty, as appears from Mr. Justice Matthews' saying in Yickwo v. Hopkins, 118 U. S. 356, 370, that:

> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Legitimate commercial transactions, such as the disposal of securities of the kind above mentioned, cannot be regulated by legislative enactment. The act in question seeks to regulate private transactions, but the person, natural or artificial, that sells securities based upon reasonable value, is entitled to the protection of the same safeguards as the man who sells clothing, dry goods, groceries, or hardware, or engages in any other private business that is not affected by a public interest. As was fittingly said in the Doyle case (p. 179):

> "The issuing of * * * stocks or bonds by a private company to get money for its own business, no one can suppose is a public or quasi-public enterprise; the business of buying and selling stocks and bonds or other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to jus-

tify its entire prohibition save under drastic restraints."

Every proposed offering of securities must first be submitted to the commissioner subject to the delay incident to his investigation or examination, which, should he temporarily grant a license or a certificate, may thereafter be continued and repeated, and, in case of an issuer mentioned in Sec. 6373-16, at its expense, limited only by his unrestrained discretion. Every investigation and examination authorized is **ex parte**. The applicant, whether a dealer or issuer, is not permitted to be heard as to the granting or revocation of a license or the award of a certificate, on the important questions of his own good repute, his alleged or surmised violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms under which his disposals are made, or his own solvency. No rules of procedure are prescribed in accordance with which the investigation or examination shall be made, nor is the commissioner required to establish any rule or regulation as to what shall constitute good repute, solvency, or fraudulent conduct. He may at will deal with each case as it arises and vary his course to suit his pleasure. He is at liberty to hear, if he chooses, only evidence unfavorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even the whim and caprice (if he gives them play) of the commissioner or of his assistant (subject to the commissioner's supervision) may not only halt, but injure and perhaps destroy a worthy business enterprise and cast a cloud on the name of the applicant or licensee, and when such applicant or licensee seeks redress in the courts he must assume the burden of disproving the findings made against him, however groundless they may be. Even an effort is in effect made to deny him access to the federal courts. Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. Rep., 1, C. C. A. 8. In given respects the above named law is more severe than that of any of the states whose "blue sky" laws have been held unconstitutional. They afforded some opportunity, at least, to the applicant to be heard when his right to do business was under investigation, and, when his business and good name were assailed, opened to him the doors of all the courts of the state for redress against adverse rulings and limited the burden of cost to which he might be subjected in consequence of an examination into his affairs.

A police regulation, like any other law, is subject to the equal protection clause of the fourteenth amendment. Atchison & Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56,

59. A statute does not deny the equal protection of the law if all persons brought under its influence are treated alike under the same conditions (Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 209) and if it does not subject the individual to an arbitrary exercise of the powers of government (Duncan v. Missouri, 152 U. S. 377, 382). The following illustrates wherein the act fails to meet the test thus prescribed: If more than fifty per cent. of the bonds of a given issue by a corporation are included in a sale to one purchaser, such issue is not embraced within the act (Sec. 6373-2) (1). The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the onerous provisions of the law, although its securities may be of the highest financial character. An owner who is not the issuer of the securities he holds is at liberty to dispose of his holdings for his own account regardless of the statute, providing he can do so without resorting to repeated and successive transactions of a similar character; but, if such transactions are expedient or necessary, he may not sell, unless, at inconvenience and financial cost and through delay and the commissioner's approving stamp of "good repute in business," he obtains a dealer's license so to do. A natural person who has not underwritten and is a **bona fide** owner of his securities, whether he be of good repute or not in business, may dispose of them for his own account, but the underwriter, although he may possess the same moral qualities and wealth as the natural person, or outrank him in both of these respects, may not dispose of his holdings, except by compliance with the none too clear provisions of the act. Although a natural person may dispose of his holdings as above indicated, a partnership or association may not do so. The exemptions based on market reports of a daily newspaper of general circulation (Sec. 6373-10) (b) and (e), would fail to embrace large numbers of meritorious issuers of the different classes of securities, for it is well known that many securities are not listed on the market or mentioned in any standard manual of information. Sec. 6373-10 (e) can have no application to an issuer, if some disposee is found who in a single transaction acquires securities of a given issue to the amount of five thousand dollars or more. There are many worthy concerns, each capitalized for a considerable sum, in which no one's investment reaches that amount. There would moreover seem to be no reason why, if some one person

who, risking that sum, should be defrauded, others should be cheated of smaller sums by sales of stock without the supervision which the law is intended to provide. A licensee may be relieved from giving information concerning the issuer of securities (Sec. 6373-10) (f), if the disposal of such securities is at a commission of less than one per cent. of their par value through a licensed member of a regularly organized and recognized stock exchange, having an established and lawfully conducted place of business in the state regularly open for public patronage, of all of which the commissioner is the sole judge. He may not be thus relieved, if the disposal is made by any one else.

The above observations upon the act have been made with full appreciation of Sec. 2, Art. XIII, of the Ohio constitution as amended September 3, 1912, the pertinent portion of which provides:

> "Corporations may be classified and there may be conferred upon proper boards, commissioners or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law."

It is to be regretted that the Supreme Court of Ohio has not been called upon either to construe this provision or to pass upon the statute now under consideration nor have we had the benefit of the discussion of this constitutional provision by counsel. We are, however, impressed with the belief that the provision cannot be so construed as to change the conclusions we have reached concerning the operation and effect of the statute. The effect of the constitutional provision, in our judgment, is simply to give distinct expression to powers which were plainly implied under the same section and article of the constitution of 1851, which provided that:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

It is settled by Berea College v. Kentucky, 211 U. S. 45, 57, that:

> "A power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a character granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.

Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass., 446, 451; Holyoke Co. v. Lyman, 15 Wall. 500, 522; Close v. Glenwood Cemetery, 107 U. S. 466, 476."

It was there further held that while the language of a statute may not in terms amend a charter, yet, where such appears to have been the legislative intent, the statute will be regarded as an amendment, Mr. Justice Brewer saying (p. 57):

> "It would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated."

It is also settled that where such power to alter or repeal a charter is reserved, it is competent for the legislature to repeal the charter as well as to amend it. Greenwood v. Freight Co., 105 U. S. 13; Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 258, 269, 270, 271; Shields v. State, 26 Ohio St. 86, 93, 94, aff'd. 95 U. S. 316, 324; State v. City of Hamilton, 47 Ohio St. 52, 73, 74. The most, then, that can be said of the statute in question is that its provisions operate to amend the articles of incorporation, the charters, of all domestic corporations that are in terms affected by the provisions of the act. It inevitably follows that these reserved powers include the power to supervise and regulate corporations. The consideration then of the present statute cannot be aided upon any theory that Sec. 2, Art. XIII, as amended, vests in the state legislature any greater power than it possessed under the old section and article; for manifestly there can be no difference between an express power and an implied power to do the same thing. It results that the constitutional validity of the present statute is to be tested by considerations practically the same as it would have been prior to the amendment in question. For example, a state is without power either through constitutional or statutory provision to avoid the effect and force of the commerce clause of the Federal Constitution; it hardly need be said that the statutory provisions before pointed out which directly impose burdens upon interstate commerce are of necessity violative of that clause; and, apart from everything else, it cannot be presumed that the legislature would have enacted the statute if it had understood that the provisions aimed against foreign corporations could not be sustained, since this alone would work an obvious discrimination against domestic corporations. Again, the power to supervise and regulate the business here involved was never before and cannot now be understood

to signify authority so to burden the business of domestic corporations as in practical effect to destroy it, regardless of its actual character and merit. We are not to be understood by anything said in this opinion to intimate that it is not within the power of the state legislature reasonably to regulate the business of corporations of its own creation or that of foreign corporations and joint stock companies which are operating within the borders of the state (Alabama & N. O. Transp. Co. v. Doyle, 186-187; Bracey v. Darst, 494, 495), such power of regulation being more extensive as to such artificial entities than as to individuals, copartnerships and voluntary associations. We do mean, however, to say, as we have already in effect stated, that the things attempted to be done by the present statute cannot be sanctioned under the guise of "supervisory and regulatory" measures in respect of the business of issuing and selling stocks and securities, whether of domestic or foreign corporations.

Other features of the act and other points argued have been considered; the treatment of the one and the discussion of the other would prolong this lengthy opinion and are not necessary.

The licenses mentioned in the first two of the above entitled causes expired on December 31, 1915. No occasion, therefore, exists, for enjoining their cancellation. The bill in each of them is drawn on narrow lines. The prayer of each, however, taken in conjunction with certain averments, is such as to warrant the temporary enjoining of the defendants therein named against enforcing or attempting to enforce the statute in question. In the third of the above cases, the motion filed by the defendants to dismiss is overruled. A temporary injunction is awarded in each case.

Order Granting Interlocutory Injunction.—Entered February 28, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Interlocutory Injunction.

This day the above entitled cause came on for hearing before the Honorable John W. Warrington, United States

circuit judge, The Honorable John E. Sater, United States district judge, and the Honorable Howard C. Hollister, United States district judge, upon the application of the above-named complainant for an interlocutory injunction in accordance with the prayer of its complaint and was argued by counsel for said complainant and said defendants, and was submitted to the court for determination. After consideration of the things alleged in the complaint and the arguments of counsel, in the opinion of the court, all of the three judges above named concurring, the act entitled,

> "An act to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio, and to prevent fraud in such sale,"

contained in Volume 103 of the Ohio Laws, at pages 743-753, and the acts amendatory thereof, being the acts set forth in the bill of complaint filed herein, are violative of the constitution of the United States, particularly of the interstate commerce clause and the clause prohibiting the deprivation of liberty and the taking of property without due process of law, and securing the equal protection of the law.

It is hereby ordered that the said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, and all his employes and subordinates and each of them individually be and they are hereby enjoined from attempting to enforce and enforcing the provisions of said acts and the acts amendatory thereto of the Ohio legislature, and from interfering in any way with the business of the plaintiff, and from exercising further activities against the plaintiff in relation to the conduct of its business and from in any wise doing anything by virtue of or under favor of said acts prejudicial to the plaintiff, to all of which defendants except.

This injunction shall continue until the final decision of this case or the further order of the court.

Leave is given defendant to answer within five days.

Petition for Appeal.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Petition for Allowance of Appeal to the Supreme Court.

The above-named defendant, Harry T. Hall, superintendent of banks and banking of Ohio, conceiving himself aggrieved by the decree made and entered on the 28th day of February, 1916, in the above entitled action, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record of proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

This 4th day of March, 1916.

Harry T. Hall,
Superintendent of Banks of Ohio.
By Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Clarence D. Laylin,
Solicitors for Defendants.

The foregoing appeal is allowed.

Dated March 4, 1916.

J. E. Sater,
United States District Judge.

Assignment of Errors.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of Ohio, Plaintiff.

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51]

Assignment of Errors.

The defendant, Harry T. Hall, superintendent of banks and banking of Ohio, respectfully specified as his reasons for appealing from the decree entered upon the 28th day of February, 1916, on the bill of complaint of plaintiff for an interlocutory injunction the following assignment of errors:

First: That the court erred in granting the interlocutory injunction against said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, his employes and subordinates, and each of them individually, from enforcing or attempting to enforce the provisions of Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, contained in Volume 103 of the Laws of Ohio, pages 743-753, and the acts amendatory thereof.

Second: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void as being in violation of Section 8 of Article I of the Constitution of the United States.

Third: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void as being in violation of Section 1 of Article XIV of the Constitution of the United States.

The defendant therefore prays that the judgment heretofore rendered be reversed; that the interlocutory injunction therein allowed be dissolved and that the defendant be restored to all things he has lost by reason thereof.

Harry T. Hall
By Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Clarence D. Laylin,
Solicitors for Defendants.

Order Allowing Appeal.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of Ohio, Plaintiff.

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51]

Order Allowing Appeal.

Upon motion of Edward C. Turner, attorney general of Ohio, solicitor for the defendant, it is ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered in this cause on the 28th day of February, 1916, be and the same is hereby allowed and it is ordered that a certified transcript of the record herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

J. E. Sater,
Judge United States District Court, Southern District of Ohio, Eastern Division.

Appeal Bond.

[Filed March 7, 1916.]

Know all men by these presents, that we, Hary T. Hall, superintendent of banks of the state of Ohio, as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the state of New York, as sureties, are held and firmly bound unto The Geiger-Jones Company, a corporation organized and existing under the laws of the state of Ohio, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said The Geiger-Jones Company, their certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this seventh day of March, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a session of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said court, between the said The Geiger-Jones Company, plaintiff, and the said Harry T. Hall, superintendent of banks of

the state of Ohio, defendant, an order or decree was rendered against the said Harry T. Hall, superintendent of banks of the state of Ohio, defendant, and the said Harry T. Hall, superintendent of banks of the state of Ohio, defendant, having obtained an order of appeal and filed a copy thereof in the clerk's office of the said court to reverse the order or decree in the aforesaid suit, and a citation directed to the said The Geiger-Jones Company, plaintiff, citing and admonishing them to be and appear at a session of the United States Supreme Court.

Now, the condition of the above obligation is such, that if the said Harry T. Hall, superintendent of banks of the state of Ohio, shall prosecute his appeal to effect, and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Harry T. Hall, [Seal]
Superintendent of Banks, State of Ohio.
American Surety Company of New York, [Seal]
By Thos. J. Davis,
Resident Vice President.
Attest: L. H. McGowan,
Resident Assistant Secretary.

Sealed and delivered in the presence of—
Margaret Crowley.
J. M. Elliott.
Approved by J. E. Sater, District Judge.

Citation.

[Filed March 21, 1916.]

United States of America, Sixth Judicial Circuit, ss.:
To the Geiger-Jones Company, Greeting:—

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein Edward C. Turner, attorney general of the state of Ohio, and Harry T. Hall, superintendent of banks and banking of the state of Ohio, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, chief justice of the United States, this 17th day of March, in

the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and fortieth.

J. E. Sater,
U. S. District Judge, Southern District of Ohio.

State of Ohio, County of Franklin, ss.

On this 21st day of March A. D. 1916, personally appeared before me, a notary public in and for said county, Henry S. Ballard, and made oath that he delivered a copy of within citation to Timothy S. Hogan, solicitor for appellee.

Henry S. Ballard.

Sworn to and subscribed before me this 21st day of March, 1916.

W. F. McNamara,
Notary Public in and for Franklin County, Ohio.

Service of copy of within citation acknowledged this 21st day of March, 1916.

Timothy S. Hogan,
Solicitor for Appellees.

Precipe.

[Filed March 21, 1916.]

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of Ohio, Plaintiff.

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51]

To the Clerk: Please prepare transcript for appealing to the Supreme Court of the United States, under Section 266 of the Judicial Code, from the order made in the above entitled cause February 28th, 1916, by Judges Warrington, Hollister and Sater, granting an interlocutory injunction, including the following:

Copy of the following pleadings and documents:

(a) Bill of Complaint.
(b) Motion for temporary restraining order.
(c) Motion for interlocutory injunction.
(d) Memorandum opinion of Judge Sater granting restraining order.
(e) Entry granting restraining order.
(f) Entry submitting case.
(g) Memorandum opinion filed by Judges Warrington, Hollister and Sater on February 10th, 1916, granting interlocutory injunction.

(h) Order granting interlocutory injunction entered February 28th, 1916.
(i) Petition for appeal.
(j) Assignment of errors.
(k) Order allowing appeal.
(l) Appeal bond.
(m) Citation with acknowledgment of service thereon.
(n) Precipe.

Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Attorneys for Defendant.

CLERK'S CERTIFICATE.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, ..., clerk of the District Court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this...............day of..............., 1916.

(Seal.)

____
Clerk.

By________________________
Deputy.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] [illegible]

No. [redacted] 439

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

DON C. COULTRAP.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 7, [illegible]

(25,386)

(25,225)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 942.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

DON C. COULTRAP.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1916.

TRANSCRIPT OF RECORD.

Bill of Complaint.—Filed November 22, 1915.

In the District Court of the United States, for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff.

vs.

Edward C. Turner, Attorney General of the State of Ohio and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

Bill of Complaint.

The plaintiff herein, Don C. Coultrap, complains of the defendants, Edward C. Turner, attorney general of the state of Ohio, and Harry T. Hall, superintendent of banks and banking of the state of Ohio, and says:

1. The plaintiff is a citizen and resident of the state of Pennsylvania, living in the city of Franklin, county of Venango, in said state; that the defendant, Edward C. Turner, is the duly elected, qualified and acting attorney general of the state of Ohio, and is a citizen and resident of said state of Ohio; that Harry T. Hall is the duly appointed, elected, qualified and acting superintendent of banks and banking of the state of Ohio, and is a citizen and resident of said state of Ohio; that the amount in controversy in this suit is in excess of three thousand dollars ($3,000.00).

2. The Geiger-Jones Company is a corporation organized and existing under and by virtue of the laws of the state of Ohio, with its principal office and place of business in the city of Canton in said state, and the general nature of the business of said The Geiger-Jones Company in which it is authorized to engage is that of buying and selling investment securities, especially the buying and selling of stocks and bonds of industrial corporations; that said company has an issued and outstanding capital stock of approximately one million six hundred and fifty-five thousand dollars ($1,655,000.00), all of which has been fully paid up, and an existing surplus of approximately two hundred and eighty-five thousand dollars ($285,000.00); that said corporation has been actively engaged since the year 1907 in the buying and selling of the securities above mentioned with the result that there is now outstanding in the hands of persons to whom it has sold, securities amounting to from twenty

million dollars ($20,000,000.00) to twenty-five million dollars ($25,000,000.00) par value; that the said securities so sold are those of corporations whose total outstanding securities amount approximately to between fifty million dollars ($50,000,000.00) and sixty million dollars ($60,000,000.00) par value, of which the aforementioned twenty million dollars ($20,000,000.00) to twenty-five million dollars ($25,000,000.00) of securities is a part; said The Geiger-Jones Company has a regular established clientage of approximately eleven thousand persons residing in the state of Ohio and other states; that the securities above referred to as having been sold and disposed of by said company are securities issued by more than twenty corporations organized and existing under and by virtue of the laws of the state of Ohio and other states and foreign countries; that said The Geiger-Jones Company is now engaged in the buying and selling of the securities of various corporations and is now engaged in buying and selling the securities of Ohio corporations and citizens in other states of the United States and in foreign countries, and in buying and selling the securities of the citizens and corporations of other states and foreign countries in the state of Ohio and in other states; that the securities so bought and sold are in many instances conveyed by mail, or otherwise, from the state of Ohio to other states and countries as a necessary part of the transactions growing out of the buying and selling of said securities; that among the said companies whose securities the said The Geiger-Jones Company is now engaged in buying and selling are those issued by The Troy Wagon Works Company, a corporation organized and doing business under and by the virtue of the laws of the state of Ohio, with its principal office and place of business in the city of Troy, state of Ohio, those issued by The American Stamping and Enameling Company, a corporation organized and existing under and by virtue of the laws of the state of Ohio, with its principal office and place of business in the city of Bellaire in the state of Ohio, those issued by The Moberley Paving Brick Company, a corporation organized and existing under and by virtue of the laws of the state of Ohio, whose principal office is in said state but whose plant and works is located in the city of Moberley, state of Missouri, and those of The Massillon Rolling Mill Company, whose principal office and place of business is located in the city of Massilon, state of Ohio.

3. The plaintiff is the owner and holder of and dealer in the stocks of the said The Geiger-Jones Company, said The Troy Wagon Works Company, said The American

Stamping and Enameling Company, said The Moberley Paving Brick Company and said The Massilon Rolling Mill Company, and is engaged in the business of buying and selling and offering to sell and dispose of the stocks of said companies and each of them in the state of Ohio and in the state of Pennsylvania, and in the course of such buying and selling of said stocks, plaintiff travels back and forth between said state of Ohio and said state of Pennsylvania, and conducts a correspondence from the state of Pennsylvania to the state of Ohio and receives the certificates evidencing the ownership of said stocks from the state of Ohio and sends the certificates, resulting from the sale of said stocks, from the state of Pennsylvania to the state of Ohio.

4. The plaintiff avers that the legislature of the state of Ohio at the regular session of 1913 passed an act entitled "To regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sale," which said act is contained in Volume 103 of the laws of Ohio, pages 743 to 753, inclusive, which said act was duly approved by James M. Cox, governor of said state of Ohio at the special session of the eightieth general assembly which began January 14, 1914, amended said law by the passage of an act entitled "To amend sections 6373-1, 6373-2, 6373-3, 6373-4, 6373-5, 6373-6, 6373-7, 6373-8, 6373-9, 6373-10, 6373-11, 6373-12, 6373-13, 6373-14, 6373-15, 6373-16, 6373-24 of the General Code of Ohio to further regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sales, which said amendatory act was approved by the governor of said state on February 17, 1914, and filed in the office of the secretary of state on February 19, 1914, which said amendatory act is found in Volume 104 of Ohio Laws, pages 110 to 119, inclusive; that the legislature of the state of Ohio at the special session of 1914, which began July 20, 1914, amended said amendatory act as appears in part of an act entitled "An act to amend Sections 712, 714, 716, 724, 736, 742-3, 742-4, 742-5, 742-9, 742-16, 6373-16 and 12898 of the General Code relative to the duties of the superintendent of banks and banking as appears in Volumes 105-106, pages 363 and 364, inclusive. Attached hereto and made a part hereof is a copy of all sections of said original act and said amendatory acts which now purport to be in force and which are unrepealed. Said copy is marked Exhibit A and is a copy of what is known as the Blue Sky law and which will be found in Sections 6373-1 to 6373-24, inclusive, of

the General Code of Ohio to which reference is hereby made.

5. Plaintiff is also the duly authorized and appointed agent of said The Geiger-Jones Company, which said company has been granted and now holds a so-called "Dealer's License" purporting to have been granted under and by virtue of said statute hereinbefore referred to as the "Blue Sky Law" and plaintiff has also been granted under the purported favor of said "Blue Sky Law" a license as an agent of said The Geiger-Jones Company for the sale of securities in this state.

6. The defendants and each of them, pretending and assuming to act in virtue of said statute or law aforesaid, and known as the "Blue Sky Law" and without any right, authority or justification in law, have threatened, and unless restrained will immediately revoke the license granted to said The Geiger-Jones Company to do business as a dealer in the securities aforesaid; will revoke the license of plaintiff as such agent to sell the securities hereinbefore describd and will cancel the certification heretofore granted permitting the sale by said The Geiger-Jones Company and by said plaintiff of the stock of the companies hereinbefore described in which said stock the plaintiff deals and in which companies he is a stockholder, all to the great, immediate and irreparable injury of this plaintiff.

7. Said defendant, Edward C. Turner, attorney general of the state of Ohio, without authority or justification in law, threatens to and will, unless immediately restrained by the order of this court, give to said defendant, Harry T. Hall, superintendent of banks and bankink of the state of Ohio, a written opinion, advising and directing said defendant, Harry T. Hall, superintendent of banks and banking, to revoke the dealer's license now held by said The Geiger-Jones Company, to revoke the agent's license now held by this plaintiff and to cancel the certification of the stocks in said companies hereinbefore described as being owned and dealt in by plaintiff, and which certification is necessary for the sale of said stocks in the state of Ohio, under the provisions of said "Blue Sky Law."

8. Said defendant, Edward C. Turner, attorney general of the state of Ohio, also without authority or justification in law, threatens to and will, unless restrained by the order of this court, give to said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, under the guise of a written opinion pretended to contain only legal advice, a written statement, certificate, recommendation or finding that the said The

Geiger-Jones Company has violated the provisions of said "Blue Sky Law" and that existing facts require the cancellation of the certification of the stocks of said companies hereinbefore enumerated, whereas said Edward C. Turner, attorney general of the state of Ohio is without power or authority to make or give any such statement, certificate, recommendation or finding, and said defendant, Edward C. Turner, attorney general of the state of Ohio, threatens to and unless restrained will cause said opinion and said statement, certificate, recommendation or finding to become and remain a public document in the files of said superintendent of banks and banking, and to cause the same to be published broadcast by the newspapers of the said state and country to the great and irreparable damage to this plaintiff, whose business will be unduly and unlawfully interfered with and whose stocks, because of such threatened unlawful proceedings on the part of said attorney general and said superintendent of banks and banking will become at once difficult to market and unduly depreciated in value, not because of lack of any inherent worth in said stocks, but because of said threatened unwarranted proceedings.

9. Said defendant, Edward C. Turner, attorney general of the state of Ohio, has, without warrant or authority in law, already advised and directed said defendant, Harry T. Hall, superintendent of banks and banking, that it will be his mandatory duty to follow the said opinion and the said statement, certificate, recommendation or finding of said Edward C. Turner, attorney general of the state of Ohio, and to cancel said dealer's license of said The Geiger-Jones Company, the agent's license of said plaintiff and the certification of said stocks hereinbefore described, and said attorney general has advised said superintendent of banks and banking that he, the said superintendent, is and will be without any discretion in the matter of revoking said licenses or cancelling said certification, but is bound by and must act in full compliance with said unauthorized opinion, statement, certificate, recommendation or finding of said attorney general, and said defendant, Harry T. Hall, superintendent of banks and banking, believing that he is bound to follow said opinion, statement, certificate, recommendation or finding of said the attorney general, and believing that he is without discretion in the premises, will, in reliance on said opinion, statement, certificate, recommendation or finding and in compliance therewith, without warrant of law, revoke said licenses

and cancel said certifications, unless restrained by the order of this court.

10. Said act of the legislature of 1913 and said amendatory acts hereinbefore described and known collectively as the "Blue Sky Law," and each of said acts are unconstitutional, invalid and void because

(a) They deprive plaintiff of his right to buy and sell in the state of Ohio valuable stocks, bonds and securities, and thus deprive him of his property, without due process of law, contrary to the Constitution of the United States.

(b) They deny to plaintiff the equal protection of the laws as guaranteed to him under the 14th Amendment to the Constitution of the United States.

(c) They impose an unreasonable and direct burden on the interstate commerce of said plaintiff in said securities, contrary to Section 8, Article I, of the Constitution of the United States.

(d) They delegate to the superintendent of banks and banking, legislative, executive and judical powers contrary to Articles 1, 2, 3 and 4 of the Constitution of the state of Ohio.

(e) They impose unreasonable, unnecessary, oppressive and unlawful burdens upon the business of the plaintiff and thus deprive him of his property, without due process of law, contrary to the Constitution of the United States.

11. If the defendant, Edward C. Turner, attorney general of the state of Ohio, is permitted to give his opinion, statement, certificate, recommendation or finding to said defendant, Harry T. Hall, superintendent of banks and banking, or if said defendant, Harry T. Hall, superintendent of banks and banking, is permitted to act upon said opinion, statement, certificate, recommendation or finding or to revoke said licenses or cancel said certification, or if said defendants or either of them be permitted to give publicity to their threatened proceedings hereinbefore referred to, irreparable and immediate injury will be done the property rights of the plaintiff and his property will be unlawfully depreciated in value, to prevent which this plaintiff is without remedy save in a court of equity.

12. If said defendants or either of them are permitted to proceed as aforesaid, under pretense of enforcing said unconstitutional and void acts or law, as they are threatening to do and will do, unless restrained by this court, this plaintiff will be prevented from conducting and prosecuting his lawful business and will be deprived of

the profits arising from the operation and conduct thereof to his irreparable damage and injury.

13. Plaintiff being remediless save and except in a court of equity, where matters of this kind are alone and properly cognizable, prays that the defendants and each of them be made parties defendant to this bill and that proper process shall issue against them and each of them; that a restraining order be issued by this honorable court enjoining, inhibiting and restraining said defendant, Edward C. Turner, attorney general of the state of Ohio, from giving the said opinion, statement, certificate, recommendation or finding to said co-defendant, Harry T. Hall, superintendent of banks and banking, and enjoining, inhibiting and restraining said defendant, Harry T. Hall, superintendent of banks and banking, from acting upon such opinion, statement, certificate, recommendation or finding and from revoking or attempting to revoke said licenses or cancelling or attempting to cancel the certifications of said securities, and enjoining defendants and each of them from publishing or placing in the official files any record of any action or proceeding had or being had in connection with the said licenses or the said certification or the companies affected thereby, and from publishing or placing in said official files said opinion, statement, certificate, recommendation or finding or the substance thereof and enjoining, inhibiting and restraining said defendants and each of them from attempting to act in virtue of or under favor of said unconstitutional, invalid and void statutes and pretended law aforesaid, or under favor of any one thereof, or any part of any one thereof, or from in any wise interfering with this plaintiff in the continuation of his business as hereinbefore described; that upon a preliminary hearing an interlocutory injunction be granted declaring said acts and each of them and each and every part thereof unconstitutional and void; that at said preliminary hearing an interlocutory injunction be granted enjoining, inhibiting and restraining said defendants and each of them from doing any of the things hereinbefore threatened and complained of and enjoining them from interfering with, preventing, molesting or otherwise interfering with the plaintiff in his business aforesaid, and that upon final hearing of this cause such interlocutory injunction be made perpetual and that in the said restraining order and in the said interlocutory injunction and by the terms thereof the said defendants and each of them be enjoined from in any manner interfering, under the pretended authority of said "Blue Sky Law," with the business or property

of the plaintiff, and for such other, further and general relief as under the facts and circumstances of this case may seem to this honorable court meet and proper in the premises.

And for this the plaintiff will ever pray.

Don C. Coultrap,
E. N. Huggins,
T. S. Hogan,
Solicitors for Plaintiff.

M. B. & H. H. Johnson,
Of Counsel.

State of Ohio, Cuyahoga County, ss.:

This day personally appeared before the undersigned, a notary public in and for Cuyahoga county, Ohio, said Don C. Coultrap, who being first duly sworn, upon his oath says that he has read the foregoing bill of complaint, knows the contents thereof and that the facts and statements therein containe' re true.

Don C. Coultrap.

Sworn to and subscribed in sence by the said Don C. Coultrap on this nin of November, 1915.

d Burroughs,
Notary Public.

"Exhibit A."

Blue Sky Law.

As Amended, 1915.

Sec. 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed "securities") evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided.

Sec. 6373-2. The term "securities," as used in this act, shall not be deemed to include conveyances of real estate; or, where the same have not been judicially declared invalid, and where, at the time of such sale, there is no default in payment of any part of the interest or principal of the same:

1. Mortgage bonds and notes (other than corporate bonds where more than fifty per cent. of the entire issue is not included in a sale to one purchaser) secured by a bona fide mortgage on real estate:
2. Securities of quasi-public corporations, the issuance of which has been authorized by the public service commission of this state;
3. The stock or obligation of any national bank, or of any bank, trust company or building and loan association, organized under the laws of this state and subject to examination and supervision by the proper authorities thereof.

The term "dealer," as used in this act, shall be deemed to include any person or company, except national banks, disposing or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a bona fide owner of the security and disposes of his own property for his own account;

(b) One who, in a trust capacity created by any law of the United States or of this or any other state or by judicial authority, lawfully disposes of any property embraced within such trust;

(c) A bank or trust company, organized under the laws of this state and subject to examination and supervision by the proper authority thereof, selling a security for a licensee, other than the issuer or underwriter thereof, at a commission of not more than two per cent., where such bank or trust company is not a regular dealer in securities;

(d) One, not the issuer, who disposes of securities to a licensee under this act or to a company which, as a part of its regular business, deals in or holds such securities;

(e) A pledgee, selling in the ordinary course of business, a security pledged to him as security for debt in good faith and not for the purpose of avoiding the provisions of this act;

(f) The issuer, organized under the laws of this state where the disposal in good faith and not for the purpose of avoiding the provisions of this act, is made for the sole account of the issuer, without any commission and at a total expense of not more than two percentum of the proceeds realized therefrom plus five hundred dollars and where no part of the issue to be disposed of is issued, directly or indirectly, in payment for patents, services, good will or for property not located in this state; provided that the president and secretary, or the incorporators if done before organization, of the issuer shall, prior to such disposal, file with the "commissioner" a written statement setting forth the existence of all such facts and that such issuer is formed for the purpose of doing business within this state.

As used in this act, the term "company" shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; "dispose of" shall be construed to mean "sell, barter, pledge or assign for a valuable consideration or obtain subscriptions for"; "issuer," the original issuer of the security; and, where the context demands it, words in the present tense include the future tense; in the masculine gender include the feminine and neuter gender; in the singular number include the plural, and in the plural, the singular number; the word "whoever" includes all persons, natural and artificial, principals, agents and employees; "and" may be read "or," and "or" "and".

Sec. 6373-3. Before such license shall be issued to any dealer, there shall be filed by him with the superintendent of banks, herein termed the "commissioner," together with a filing fee of five dollars, an application for such license, together with information, in such form as shall be determined by such "commissioner," setting forth:

(a) The names and addresses of the directors and officers if such applicant be a corporation or association and of all partners if it be a partnership, and of the person if the applicant be an individual, together with names and addresses of all agents of such applicant assisting in the disposal of such securities;

(b) Location of the applicant's principal office and of his principal office in the state, if any;

(c) The general plan and character of the business of said applicant, together with references which the "commissioner" shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners and agents.

If the applicant be a corporation organized under the laws of any other state, territory or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation certified by the proper officer of such state, territory or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement.

The applicant at the same time shall also file with said "commissioner" a duly executed written instrument, irrevocable, consenting that any action brought against such applicant, arising out of and founded upon the fraudulent disposal of such securities by him or his agents, may be brought in Franklin county, and that, in the event that proper service of process cannot be had upon such applicant in such county, service of process made therein by the sheriff of such county, by sending a copy thereof by registered mail, at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application or such other place as the applicant may thereafter designate in writing filed with the "commissioner," shall have the same effect as if personally made upon the applicant according to the laws of this state.

Sec. 6373-4. Notice of all applications for registration as a licensed dealer in such securities shall be published in a daily newspaper of general circulation in the city where the applicant's principal place of business in the state is located, or in the city of Columbus, if the appli-

cant has no such place of business in the state, and no such application shall be acted on by the "commissioner" until the expiration of one week from the date of such publication, but shall be acted upon within twenty days after proof of such application has been filed with him. If the "commissioner" be satisfied of the good repute in business of such applicant and named agents, he shall, upon the payment of an annual fee of fifty dollars, and an additional fee of five dollars for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon payment of such annual fee, unless revoked as herein provided. The expense of all publications provided for in this act shall be paid by the applicant for license. Pending a final disposition of such application the "commissioner" may grant temporary permission to such applicant to transact business as a dealer under this act. All such renewals shall be made as of the first day of January in each calendar year upon proper application therefor, filed not less than twenty nor more than sixty days next preceding such date.

Sec. 6373-5. Such license shall be taken out at the beginning of each calendar year, but it may be issued at any time for the remainder of such year, and in such case the annual fee shall be reduced four dollars for each expired month, but in no case shall it be less than ten dollars. Upon the payment of a fee of five dollars for each specified agent not named in such license the same may at any time be amended or supplemented to include such agent. Upon the written request of such applicant, accompanied by a fee of two dollars, such license shall be revoked as to any agent or agents of such applicant, and an amended license shall thereupon be issued for such applicant and his remaining agents; and thereafter the applicant shall not be bound by the acts of the agent whose license has been revoked. Notice of such amendments shall also be published as aforesaid.

Sec. 6373-6. Such "commissioner" may at any time revoke any such license, or refuse to renew the same, upon ascertaining that the licensee:

(a) Is of bad business repute;

(b) Has violated any provision of this act; or

(c) Has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions.

No dealer whose license has been revoked shall be relicensed within six months from the date of such revocation.

The "commissioner" shall at once lay before the prosecuting attorney of the proper county any evidence which shall come to his knowledge of criminality under this act.

Sec. 6373-7. At least five days before revoking or refusing to grant or renew a license, the "commissioner" shall send by registered mail to the licensee, at the address named in the application written notice of his intention so to do, specifying therein the reasons for such revocation or refusal.

Sec. 6373-8. Any one whose license shall be refused or revoked or to whom a renewal of license may be denied, may file, within thirty days thereafter, in the court of common pleas of Franklin county, a petition against the "commissioner," officially, as defendant, alleging therein, in brief detail, the plaintiff's qualifications to be licensed and praying for a reversal of the official action complained of. Upon service of summons upon said defendant, returnable within three days from its date, but otherwise made as in civil actions, he shall, within one week from such return day, file an answer, in which he shall allege by way of defense the grounds previously assigned in his notice to such applicant or licensee, and such other grounds as shall, in the meantime, accrue or be discovered. All allegations of the answer shall be deemed to stand denied without further pleading and, upon application of either party, the cause shall be advanced and heard without delay. Merely technical irregularities in the procedure of such "commissioner" shall be disregarded and the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of. The court's decision shall consult only the rights of the plaintiff and the protection of the public and the "commissioner" shall prosecute no proceedings to obtain a reversal, modification or vacation of a judgment rendered in favor of the plaintiff and in such event, shall forthwith issue the license applied for. A judgment sustaining the refusal of the "commissioner" to grant or renew a license shall not bar, after thirty days, a new application by plaintiff for a license, nor shall a judgment in favor of the plaintiff prevent such "commissioner" from thereafter revoking such license for any proper cause which may thereafter accrue or be discovered.

Sec. 6373-9. Before such licensee shall dispose of any of such securities, within this state, he shall file with such "commissioner," in such form as shall be determined by him, the following information concerning such securities, if issued by any company:

(a) The name, location of principal office of the issuer and the names of its officers and directors, or if a copartnership, the partners;

(b) A statement of the issuer, showing in general detail, the assets and liabilities, and capital stock of the issuer, as of a date as late as the close of its last fiscal year, and of its gross income, expenses and fixed charges, for one year last prior thereto, or for such time as the issuer has been in business, if less than one year;

(c) A pertinent description of such securities, and the purpose of said issue, and

(d) Unless the foregoing information be excused under the provisions of the following section, the approximate price at which the licensee purposes to dispose of such securities.

If the securities be of a taxing subdivision of any other state, territory, province or foreign government, and are not an obligation of the entire taxing subdivision and payable out of the proceeds of a general tax, there shall be filed the information required by paragraphs (c) and (d) of this section and, in addition thereto, a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the same is secured and that, to the best of his knowledge, there is no default in the payment of any part of the interest or principal of such securities and are no adjudications adversely affecting, or pending suits questioning the validity of the same.

Sec. 6373-10. The information required in the preceding section need not be filed:

(a) Unless required by the "commissioner," if the same has been filed by any other licensee; or

(b) If actual current sales of the securities, at prices quoted, shall have been, from time to time, for not less than six months next preceding such disposal, published in the regular market reports of the news columns of a daily newspaper of general circulation in this state; or

(c) Where there is a disposal of securities, the price paid or consideration rendered for which, in a single transaction, by one disposee, shall amount to five thousand dollars or more; or

(d) Where the securities disposed of are those of manufacturing or transportation companies, or of common carriers or other public utilities, issued and outstanding in the hands of bona fide purchasers for value, prior to March 1, 1914, where such companies were, on said date, and shall be, at the time of sale, actual going concerns, either directly or through lessees, and where there shall be at the time of sale no default in payment

of any part of the interest or principal of such securities; or

(e) Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by such "commissioner"; or

(f) Where the disposal is made for a commission of less than one percentum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted place of business in this state, regularly open for public patronage as such.

Sec. 6373-11. Every dealer, before or at the time of circulating the same, shall furnish to the "commissioner" one copy of each prospectus, circular or other document of like nature and of each advertisement circulated by him in connection with the sale of any securities concerning which information is required to be filed under the provisions of Sections 6373-9 and 6373-10 of the General Code.

Sec. 6373-12. No person or company shall, for the purpose of organizing or promoting any insurance company, or of assisting in the flotation of its stock after organization, dispose or offer to dispose, within this state, of any such stock, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language:

"No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of........per cent. of the amount actually paid upon separate subscriptions, or, in lieu thereof there may be inserted, '$........per share from every fully paid subscription,' and the remainder of such payments shall be invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be) and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority."

The amount of such commission, promotion and organization expenses shall in no case exceed fifteen per cent. of the amount actually received upon the subscription.

Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and

ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid.

Sec. 6373-13. Whoever, with intent to secure financial gain to himself, advises and procures any person to purchase any security and receive for such advice or services any commission or reward from the owner or salesman thereof, without disclosing to the purchaser the fact of his agency or his interest in such sale shall be liable to such purchaser for the amount of his damage thereby, upon tender of such security to, and suit brought against, such adviser, within one year subsequent to such purchase.

Sec. 6373-14. For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in Section 6373-16 of the General Code, which shall not be done until, together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in Section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of Section 6373-9 of the General Code, the following:

(a) A certified copy of the articles of incorporation or association of the issuer, its regulations and by-laws;

(b) Certified copies of all minutes of stockholders and directors relative to the issue of such securities;

(c) A sworn statement made by the president and secretary of the issuer, showing in detail the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment;

(d) Like certified copies of all contracts or agreements between the issuer and any underwriter of such securities, and, if disposed of by the issuer, all contracts and agreements relative to the sale and disposition thereof; and any such contracts or agreements made subsequent thereto shall be filed immediately upon the execution thereof;

(e) All contracts made between such underwriter and any salesman, agent or broker.

This section shall not apply where the issuance of the securities has been approved by the public service commission or like body of any state of the United States or any province of the Dominion of Canada, or where the

sale is made by or on behalf of an underwriter who, in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him and pays therefor, in cash or its equivalent, before attempting to sell the same, not less than ninety percentum of the price at which such securities are thereafter sold by him; nor where the securities are those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal mining or quarrying, and the whole or a part of the property upon which such securities are predicated is located within this state; nor of a real estate or building company all of whose property, upon which such securities are predicated, is located in this state; nor in the case of an issuer excepted under paragraph (f) of Section 6373-2, General Code; nor in cases where the filing of information is dispensed with under the provisions of paragraphs (b), (d), (e) or (f) of Section 6373-10, General Code.

The information required by paragraphs (d) and (e) of this section shall be for the information of the commissioner only, and shall not be disclosed by him except when lawfully required in a judicial proceeding.

Sec. 6373-15. No person or company, unless licensed in the manner and under the conditions applicable thereto hereinbefore provided for dealers, shall, within this state deal in real estate not located in Ohio of which he is not the actual and bona fide owner and unless the "commissioner" shall issue his certificate as provided in the following section, and prior to such issuance there shall, together with a filing fee of five dollars, be filed with the "commissioner" an application for such certificate, and a written statement of the applicant containing a pertinent description of the real estate the sale of all or a part of which is sought to be made, and the nature and source of the title of the owner thereto, and the amount or value and the nature of the consideration paid or allowed by him therefor, it shall, within this state, be unlawful:

(a) For any corporation, association or co-partnership doing business under any name other than the name or names of such person or of all the members of such association or co-partnership to sell any real estate not located in Ohio;

(b) For any person or company engaged in the business of dealing in real estate to sell or offer for sale any such real estate, the title to which is or is represented to the purchaser to be in the name of a corporation or unin-

corporated company, or of a person doing business under a fictitious name.

This section shall apply where the title to such property is held in the name of a trustee for any corporation or for any such described person or company; but it shall not be deemed to prohibit the disposal by an owner of his own property, in good faith and not for the purpose of avoiding the provisions of this act, where the transaction is not one of repeated transactions of a similar nature, performed as a part of the business of dealing in real estate; nor shall it be deemed to prohibit a railroad company having an immigration bureau or department from advertising either directly or through its accredited representatives, the fact that there are along its route lands for colonization or sale; provided that such advertising be not of specific tracts of real estate, and not for the purpose of avoiding the provisions of this act.

Sec. 6373-16. Said commissioner shall have power to make such examination of the issuer of the securities, or of the property named in the two next preceeding sections, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable. When in the discretion of the commissioner all or any part of the expense of such examination should be paid by the applicant for such certificate, such applicant shall deposit with the commissioner such sum of money as the commissioner may order, out of which said sum the commissioner shall pay that portion of the expense of such examination as the commissioner determines said applicant should pay. The commissioner shall render to the applicant an itemized statement of the expenditure and a proper record thereof shall be kept. And if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and that the issuer or vendor is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. But if it shall not affirmatively so appear he shall so notify the applicant, in writing, and of his refusal to issue such certificate. Such certificate shall be issued or refused within a reasonable time after the filing of the application therefor, which shall be within not more than 30 days from and after the applicant or certificate holder whose certificate has been revoked has fully complied with all requirement of this act precedent thereto; provided, that the commissioner may at any time revoke any such certificate issued by

him when he has reason to believe that the business of the holder thereof is being fraudulently conducted, or that such securities or other property are being disposed of upon grossly unfair terms, or, in the case of securities that the issuer thereof is insolvent. Such applicant shall have the same right of review of such finding as is given to a dealer by Section 6373-8. The fee provided for in this section shall not be required of an applicant who is licensed as a dealer.

Sec. 6373-17. Such certificate shall recite in bold type that the "commissioner" in no wise recommends such securities or other property; and no person or company shall advertise, in connection with the sale of such securities, the fact that such certificate has been issued unless such advertisement also contains in bold type a copy of such recital.

Sec. 6373-18. In addition to the liability now imposed by law, any person or company that, by written or printed circular, prospectus, statement or advertisement of any kind, shall offer for subscription or purchase any security, or receive the profits accruing from the disposal of securities so advertised, shall be liable to any person who, on the faith of such advertisement or document, acquires such security, for the loss or damage sustained by him by reason of any untrue statement contained therein, unless such person or company shall establish that he or it had no knowledge or notice of the publication of such advertisement prior to the transaction complained of, or had just and reasonable grounds to believe the statements thereof to be true. Wherever any corporation shall be so liable, the directors thereof shall also be, under like limitations, jointly and severally liable. Any such director, upon the payment of a judgment so obtained against him, shall be subrogated to the rights of the plaintiff against such corporation and shall have the right of contribution for the payment of such judgment, under like limitations, against any of his fellow directors. Lack of reasonable diligence to ascertain the fact of such publication or the falsity of any statement therein contained, shall be deemed to be knowledge of such publication and of the falsity of any untrue statement thereof. Any action brought against such director, based upon the liability hereby imposed, shall be brought within two years after the acquisition of the security by any person so damaged or after payment of the judgment for which contribution is sought.

Sec. 6373-19. If the issuer of such securities be a company incorporated, organized or formed to make any insurance named in subdivisions I and II, division III,

title IX of the General Code, the "commissioner," for all the purposes named in sections 14 and 16 of this act, shall be the superintendent of insurance of this state. In addition to the powers given to, and the duties prescribed to be performed by, such "commissioner," under said sections, the superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state.

Sec. 6373-20. Whoever knowingly makes any false statement of fact in any statement or matter of information required by this act to be filed with the "commissioner," or in any advertisement, prospectus, letter, circular or other document, containing an offer to dispose or solicitation to purchase, or commendatory matter concerning such securities or real estate, with intent to aid in the disposal of the same, or whoever knowingly violates any of the provisions of sections 12, 14 or 15 of this act, or for the purpose of aiding in the disposal of any security or real estate, knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, shall be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned in the penitentiary not more than one year or both; and whoever violates any of the other provisions of this act shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned in the county jail or workhouse not more than sixty days, or both.

Sec. 6373-21. In any prosecution brought under this act, the accused shall be deemed to have had knowledge of any matter of fact where in the exercise of reasonable diligence, he should, prior to the commission of the offense complained of, have secured such knowledge. Information and indictments under this act need not negative any of the exceptions enumerated in sections two, ten and fourteen hereof.

Sec. 6373-22. Nothing herein contained shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of this act, for the violation of any other statute or of any other provision hereof.

Sec. 6373-23. Nothing herein contained shall be so construed as to impair the obligation of prior contracts.

Sec. 6373-24. The superintendent of banks, as "commissioner" under this act, is hereby authorized to appoint

an assistant commissioner and such clerks as are actually necessary to carry out the provisions of this act and to fix their salaries; such appointments and salaries to be subject to the approval of the governor. Subject to the supervision of such "commissioner," the assistant commissioner may perform all the duties imposed upon, and have all the powers granted to such "commissioner" under the provisions of this act. All fees received hereunder by the "commissioner" shall be deposited by him with the treasurer of state upon the warrant of the auditor of state.

Index.

Affidavit of Harry T. Hall.—Filed November 26, 1915

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

Affidavit.

State of Ohio, Franklin County, ss.:

Harry T. Hall, of lawful age, being first duly sworn, deposes and says that he is the duly appointed, qualified and acting superintendent of banks and banking of the state of Ohio; that as such superintendent of banks and banking he has in his custody and under his control the records and files of said department; that on the eighth day of December, 1914, The Geiger-Jones Company, a corporation organized under the laws of the state of Ohio and having its principal place of business in the city of Canton, Ohio, filed with said department of banks and banking its application for a renewal of its license to deal in securities under favor of Sections 6373-1 to 6373-24, inclusive, of the General Code, and on said eighth day of December, 1914, also filed with said department of banks and banking the names of its agents whom it desired to act for it under authority of its license during the year 1915; that the name of Don C. Coultrap, plaintiff in this action, appears in said list as an agent of said company, giving as his place of residence the city of Sidney, in the state of Ohio.

And further affiant saith not.

Harry T. Hall.

Sworn to and subscribed before me by the said Harry T. Hall this twenty-sixth day of November, A. D. 1915.

[Seal.] J. W. Shaw,

Notary Public in and for Franklin County, Ohio.

Motion for Temporary Restraining Order.—Filed November 26, 1915.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

Motion for a Temporary Restraining Order.

Now comes the plaintiff herein, by his duly authorized attorneys, and moves the court for a temporary restraining order herein in accordance with the prayer of the petition.

E. N. Huggins,
T. S. Hogan,
Solicitors for Plaintiff.

Entry Submitting Case.—Filed November 27, 1915.

Don C. Coultrap

vs.

Edward C. Turner, Attorney General of the State of Ohio, et al.

Entry.

This day this cause came on for hearing to the court upon the pleadings, and was argued by counsel for the parties, Messrs. M. B. Turner and T. S. Hogan, for the complainants, and E. C. Turner, attorney general, for the defendants, and was submitted to the court; whereupon the court took said cause under advisement and same is continued until the further order of the court in the premises.

Memorandum Opinion.—Filed February 10, 1916.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

William R. Rose and The RiChard Auto Manufacturing Company, a Corporation Organized Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

On Application for Temporary Injunction.

Before Warrington, Circuit Judge, and Sater and Hollister, District Judges.

Sater, District Judge:

The constitutionality of the so-called "blue sky" law of Ohio (Secs. 6373-1 to 6373-24, General Code, 103 Ohio L. pp. 743-753, 104 Ohio L. pp. 110-119, 105-106 Ohio L., pp. 363-364) is assailed in each of the above mentioned cases, which, for convenience, are considered together. Statutes of a kindred character have in learned opinions been declared invalid by federal courts sitting in Michigan (Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. Rep. 173, Halsey & Co. v. Merrick, not yet reported), Iowa (Compton v. Allen, 216 Fed. Rep. 537), West Virginia (Bracey v. Darst, 218 Fed. Rep. 482), and South Dakota (Sioux Falls Stockyards Co. v. Caldwell). The last named case, which is unreported, was decided by Sanborn, Circuit Judge, and Munger and Elliott, District Judges. Although a consideration of the act will involve a reiteration of principles already ably and convincingly stated, it is thought advisable to review it in part, at least,—a task rendered difficult on account of the

numerous exceptions to its general provisions, and, in some instances, of exceptions to such exceptions.

The Geiger-Jones Company, an Ohio corporation, is engaged in buying and selling in Ohio and other states, stocks and bonds principally of industrial corporations, domestic and foreign. It seems to prevent the revocation of the license heretofore granted it to transact such business and the threatened enforcement of the law against its continued prosecution of the same. Coultrap, a citizen of the state of Pennsylvania, and an agent of the Geiger-Jones Company, is the owner and holder of and a dealer in stocks of certain Ohio corporations and conducts his business in part by mail and in part by personal visits to the state. He charges that the revocation of the license of his employer will operate as a cancellation of his authority and that the contemplated enforcement of the statute will interrupt and destroy his business. Rose was heretofore arrested, indicted and convicted in one of the state courts for violating the act by selling the stocks and bonds of industrial concerns, and, particularly, the stock of his co-plaintiff, a West Virginia corporation, and is now awaiting sentence. Both he and The Richard Auto Manufacturing Company allege that the enforcement of the statute by the defendants named in their bill will prevent Rose from prosecuting his business of selling securities and his co-plaintiff from completing its organization and capitalization for the manufacture of automobiles. Briefly stated, the validity of the act is assailed on the grounds that (1) it is violative of the commerce clause of the federal constitution; (2) it is constitutionally obnoxious in that it denies plaintiffs of property without due process of law and the equal protection of the laws; (3) it delegates legislative and judicial power to an executive officer, in violation of the state constitution; and (4) it is a law of a general nature but does not operate uniformly throughout the state, as required by Section 26, Article 2, of the state constitution. If the act be unconstitutional, each of the plaintiffs is, as he must be, within the class whose constitutional rights are invaded. Standard Stock Food Co. v. Wright, 224 U. S. 540, 550. The prayer of each bill is for general as well as specific relief.

The act, which is entitled, "An act to regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales," prohibits, under severe penalties, the disposition of all securities subject to its provisions, without discrimination as to and regardless of their value, unless authority so to do is first obtained from the superintendent of banks

(termed the commissioner). The term "dispose of" is broadly construed to mean, "sell, barter, pledge, or assign for a valuable consideration or obtain subscriptions for." The first section, 6373-1, in comprehensive language declares that, except as otherwise provided in the act, no dealer may within the state dispose of or offer to dispose of any stocks, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all termed "securities") evidencing title to or interest in property issued or executed by any private or quasi-public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without being first licensed so to do. Promissory notes are not within the terms of the act, as was the case in the original Michigan statute. A limited number of other securities are also excluded from its provisions. The inclusive character of the act extends not only to "securities" coming within its provisions, but also to the persons subject to its exactions, prohibitions and penalties, as is evidenced by its definition of the terms "dealer" and "company," the former embracing "any person or company" and the latter "any corporation, copartnership or association, incorporated or unincorporated, whenever and wherever organized." The term "dealer" does not, however, include national banks or any company engaged in the marketing or flotation of its own securities or any stock-promoting scheme, although such company and scheme are required to obtain the certificate of the commissioner mentioned, and must abide by all the provisions contained, in Sections 6373-14 and 6373-16. A restricted number of other persons, natural and artificial, having occasion to dispose of securities, are also excluded from the classification of dealers. An "issuer" is defined to be an original issuer.

The act must be sustained unless it can be clearly shown to be in conflict with some constitutional provision. The question as to its wisdom was for the determination of the legislature; with that the court is not concerned. If the power under the federal constitution to enact it is absent, it is unimportant how wise, necessary or beneficent it may be, for it is then necessarily void because in conflict with the organic law of the land. Rail & River Coal Co. v. Yaple, 214 Fed. Rep. 273, 279, 280; Alabama & N. O. Transp. Co. v. Doyle, 176; Bracey v. Darst, 491, 492; Board of Health v. Greenville, 86 Ohio St., 1, 20; State v. Toledo, 48 Ohio St., 112, 132, 133.

If there are separate and independent unconstitutional provisions in the statute, which may be rejected,

and the rest of the act be permitted to stand and have effect according to the legislative intent, the valid portions must be upheld. But if an unconstitutional element pervades the entire statute as an inherent and essential part, it must fail as an entirety. In such a case it does not avail that the officer charged with the execution of the law may not enforce it according to its terms, but only as he may deem wise and expedient. Assent cannot be given, under such circumstances, to the proposition that although a statute may authorize the accomplishing of an unconstitutional purpose, it must, nevertheless, be presumed that it will, in fact, only be used to accomplish what can be done in accordance with the constitution. Taylor v. Com'rs., 23 Ohio St. 22, 33, 34; Alabama & N. O. Transp. Co. v. Doyle, 181; Bracey v. Darst, 491, 492; People v. Warden, 144 N. Y. 529, 539.

Because a certificate of stock is only evidence of the ownership of shares, the interest represented by them being held by the company for the benefit of the true owner (Citizens Sav. & Tr. Co. v. Ill. Cent. R. R., 205 U. S. 46, 57; Bank v. Mfg. Co., 67 Ohio St. 306, 314), it does not follow, as defendants' counsel contend, that such certificate is of less value than an unprinted sheet of paper of corresponding size and quality, and that it cannot therefore be a subject of interstate commerce. If it be but written evidence of an interest in corporate property, the same may be said of notes and bills, which are mere evidence of indebtedness on the part of individuals or corporations that issue them. In Merritt v. American Steel-Bars Co., 79 Fed. Rep. 228, 235, C. C. A. 8, in speaking of stock certificates, it was said that:

> "In the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

In Ohio a stock certificate is so far property that it may be seized by an officer making an attachment or levy. Sec. 8673-13, G. C.

A state law which, in its essentials, is a legitimate exercise of the police power, is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected; but, if such law directly burdens such commerce, although expressed to be a regulation under the state police powers, it must be held to be unconstitutional, for the reason that the power to regulate commerce between the states is vested in Congress.

Arnold v. Yanders, 56 Ohio St. 417, 421; Re Oscar Julius, 4 Ohio C. C. (N. S.), 604, 609; Mugler v. Kansas, 123 U. S. 623, 661; Austin v. Tennessee, 179 U. S. 343, 344.

Utterances emanating from the Supreme Court and express rulings by lower federal courts establish beyond all reasonable controversy that stock and bonds, securities whose disposition is subject to the provisions of the act, are articles of legitimate interstate commerce. Bracey v. Darst, 495, 496; Compton v. Allen, 546. Sales of them as between the states and their transmission from one state to another, whether through the mails or the instrumentality of common carriers, constitute interstate commerce. Sales may be and are effected by telegraph, telephone, correspondence, traveling salesmen and the issuers or investment companies directly or through their local or branch houses. The securities may be delivered by such salesmen or branch houses at the times sales are made or subscriptions taken, or by the issuers or investment companies by means of any of the known and usual agencies for transmitting such instruments from one state to another.

Whether interstate transactions in the securities whose disposition is within the purview of the act directly burdens interstate commerce must be determined by testing its provisions by the federal constitution. The act (Sec. 6373-3) requires as a condition precedent to the authorization and right of an applicant to do business in the state that such applicant shall submit, with a filing fee of five dollars, to the commissioner, (a) the names and addresses of the applicant's directors and officers, if the applicant be a corporation or association, and of all partners, if it be a partnership, and of the individual, if it be such, and also the names and addresses of all agents of such applicant, assisting or about to assist in the disposition of securities; (b) the location of its principal office without and within the state, if it have both; and (c) the general plan and character of its business, and references as to its suitability to transact such business, which references the commissioner "shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant's directors, officers and agents." If the applicant be a foreign corporation, having its principal place of business beyond the boundaries of the state, it must also file a duly certified copy of its articles of incorporation, regulations and bylaws, and, if it be an unincorporated association, a certified copy of its articles of association or deed of settlement. Every applicant must also submit to the commissioner an irrevocable written consent to litigate in the

courts of Franklin county only any action brought against him on account of any fraudulent disposal of securities by him or his agents, and also to be bound by service of process made personally or by registered mail. Notice of all applications for registration as a licensed dealer in securities must be published at the expense of the applicant in a daily newspaper of general circulation, and a further payment of an annual fee of fifty dollars is exacted should a license be issued. An amended license is necessary whenever the name of an agent is added to or stricken from the original, a payment of five dollars being exacted in the first instance and of two dollars in the latter. Notice of each amendment to the license must be published at the licensee's expense. The commissioner may at any time revoke any license or refuse to renew the same upon ascertaining—the manner of which is not stated—that the licensee is of bad business repute, has violated any provision of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions. He is required to give at least five days' notice of his intention to revoke or to refuse to renew or grant a license, but the licensee or applicant, as the case may be, is not accorded a hearing. Following the refusal or revocation of a license, the applicant or licensee, as the case may be, may contest in the Franklin county court the correctness of the commissioner's ruling, but must assume the burden of disproving the grounds assigned as the basis of his official action, and must also meet any additional reasons which the commissioner may plead in justification.

Notwithstanding the granting of a license to an applicant, it may not dispose of any given securities until it has also filed, unless excused by the commissioner from so doing, a further statement (Sec. 6373-9) touching the issuer of such securities, if the issuer be a company, setting forth (a) its name and the location of its principal office and the names of its officers and directors, or, if it be a co-partnership, the names of the partners; (b) a general detailed showing of its assets, liabilities, and capital stock, as of a date not later than the close of the last fiscal year, and also of its gross income, expenses and fixed charges for the year last prior thereto, or for such other time as the issuer has been in business, if that time be longer than a year; (c) a pertinent description of such securities and the purpose of their issue; and (d) the approximate price at which the licensee proposes to dispose of them. The exemptions from the filing of the information called for by such section which the statute

permits the commissioner to grant are enumerated in Sec. 6373-10. In most instance they are so qualified as to relieve but a limited number of licensees and introduce a fatal inequality as regards the protection of the laws guaranteed by the fourteenth amendment.

The statute further provides that no issuer or underwriter, nor any person or company acting in behalf of either (Sec. 6373-14), shall, within the state, for the purpose of organizing or promoting any company or of assisting in the flotation of its securities, dispose or attempt to dispose of any such securities until the commissioner has issued a certificate permitting such to be done, the granting of which must be subsequent to the issuer or underwriter filing an application (except in certain instances which need not now be noted), with a fee of five dollars, containing the information required by paragraphs (a), (b), (c) and (d) of Sec. 6373-9, a certified copy of the issuer's articles of incorporation or association, regulations and by-laws, of all minutes of stockholders and directors relative to the issuance of such securities, of any contracts which have been made between the issuer and its underwriter of such securities (copies of all such subsequent contracts also to be filed when made), and of all contracts between any underwriter and any sales agent or broker, and also a sworn statement made by the president and secretary of the issuer showing in detail the items of cash, property, services, patents, good will, and any other consideration for which such securities have been or are to be issued in payment. The commissioner (Sec. 6373-16) may, as he deems advisable, examine the issuer of such last named securities at any time, both before and after his grant of the certificate named in Sec. 6373-14. In the exercise of his discretion, he may require all or any part of the expense of such examination to be borne by the applicant, who is compelled to deposit with him in advance for such purpose whatever sum he may order. The applicant receives an itemized statement of expenditures made, but this follows the conclusion of the examination. If the commissioner finds that the applicant has complied with the law, is not fraudulently conducting its business, is not proposing to dispose of its securities on grossly unfair terms and is solvent, a certificate authorizing the disposal of such securities shall issue, providing, except in case of a licensed dealer, a fee of ten dollars be paid, but, if the commissioner does not affirmatively so find, the certificate must be refused. It must be issued or denied within a reasonable time after application for it is made, which time shall be within thirty days after the

applicant or certificate holder, whose certificate has been revoked, has fully complied with all the requirements of the act, but as the commissioner is the sole judge of what constitutes compliance, and as the examination, especially of large concerns, would in some instances be prolonged and at times have to be conducted at distant points in this or another country, the issuing of a certificate may be delayed indefinitely and beyond the thirty day period. After the applicant is authorized to proceed with its proposed business, the commissioner may still revoke its certificate and deny it the privilege of continuing to dispose of the securities in question, if he has reason to believe that the certificate holder's business is fraudulently conducted, or that the securities are disposed of upon grossly unfair terms, or that the issuer is insolvent, the right to review his action being again restricted to the Franklin county court. Whether such "reason to believe" shall be the result of an orderly examination of the issuer's conduct and affairs, or be otherwise acquired, does not appear.

Violation of the act constitutes a misdemeanor or felony, regard being had to the character of the offense, and is visited by a fine or imprisonment, or both.

In International Text Book Co. v. Pigg, 217 U. S. 91, and Buck Stove Co. v. Vickers, 226 U. S. 205, 213-216, a Kansas statute, akin to the Ohio act, but less drastic, was held to impose a direct burden on legitimate interstate commerce and to be violative of the commerce clause of the federal constitution not only on account of the license required as a condition precedent to the right to transact a lawful business, but because it is not competent for a state legislature to prescribe, as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock, authorized and paid up, and its par and market value, as to its assets, liabilities, officers, trustees, directors, manager, and stockholders, with a showing of the stockholdings of each of the latter and the amount paid on his holdings, and the post-office address of all of such above named persons. A quite similar but (as regards the parties at whom it was aimed) a more comprehensive statute in that it ran not only against express or transportation companies incorporated by any foreign government, but, like the present act, also against any association or partnership acting under the laws of any foreign government, was likewise denounced in Crutcher v. Kentucky, 141 U. S. 47, in a well reasoned opinion which is freely quoted in the Pigg case. The draughtsman of the act here in question, un-

wittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above named cases, and added others equally, if not more, obnoxious. The burdens which it imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable. The enforced suspension from all business activity for a period of thirty days, imposed by the original Michigan act, was held to be a fatal "30-day paralysis." In the later decision rendered by the same court (Halsey & Co. v. Merrick) the subsequent act of that state was overthrown, notwithstanding the absence of such restrictive provision. In the present act the prohibition from the transaction of business must extend for a week, and possibly twenty or thirty days, or more; it therefore offends against the constitution quite as much as the first of the Michigan acts.

The act must be further tested by its effect upon the citizen's right to pursue a lawful calling. The natural right to life, liberty and the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the public welfare, health or prosperity. But, however viewed, the act transcends the legitimate exercise of the police power and violates the due process clause of the constitution. There is a fundamental distinction between what Mr. Justice Bradley termed, in Butchers Union Co. v. Crescent City Co., 111 U. S. 746, 763, the ordinary occupations and pursuits of life, forming the large mass of industrial avocations which are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand, and the kinds of business and transactions which are affected by a public interest or arise from public grant or exist by public sufferance. Of this latter class are the liquor traffic, grain elevators, innkeepers, warehouses, itinerant peddlers, insurance, motion picture shows, concerns exercising public franchises, and the like, all of which it is competent for the state law-making power to regulate and within proper bounds subject to executive license and control, as the interests of society may require. To the former class, with which alone we are now dealing, belongs the right in good faith to buy and sell securities and to fix their price by agreement, either in individual transactions or in the course of repeated and successive transactions of a similar char-

acter, a right which, when so exercised, is both property and liberty and which cannot be made subject to either executive grant or denial. City of Cleveland v. Construction Co., 67 Ohio St. 197, 219. In Allgeyer v. Louisiana, 165 U. S. 578, 589, it was said that the liberty mentioned in the fourteenth amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." If an issuer or owner of or dealer in securities issued in good faith and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal or of offering them for disposal, he is deprived not only of his property, within the meaning of the constitution, by taking from him one of the incidents of ownership (City of Chicago v. Netcher, 183 Ill., 104, 110), but also of his liberty, as appears from Mr. Justice Matthews' saying in Yickwo v. Hopkins, 118 U. S. 356, 370, that:

> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Legitimate commercial transactions, such as the disposal of securities of the kind above mentioned, cannot be regulated by legislative enactment. The act in question seeks to regulate private transactions, but the person, natural or artificial, that sells securities based upon reasonable value, is entitled to the protection of the same safeguards as the man who sells clothing, dry goods, groceries, or hardware, or engages in any other private business that is not affected by a public interest. As was fittingly said in the Doyle case (p. 179):

> "The issuing of * * * stocks or bonds by a private company to get money for its own business, no one can suppose is a public or quasi-public enterprise; the business of buying and selling stocks and bonds or other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to jus-

tify its entire prohibition save under drastic restraints."

Every proposed offering of securities must first be submitted to the commissioner subject to the delay incident to his investigation or examination, which, should he temporarily grant a license or a certificate, may thereafter be continued and repeated, and, in case of an issuer mentioned in Sec. 6373-16, at its expense, limited only by his unrestrained discretion. Every investigation and examination authorized is **ex parte**. The applicant, whether a dealer or issuer, is not permitted to be heard as to the granting or revocation of a license or the award of a certificate, on the important questions of his own good repute, his alleged or surmised violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms under which his disposals are made, or his own solvency. No rules of procedure are prescribed in accordance with which the investigation or examination shall be made, nor is the commissioner required to establish any rule or regulation as to what shall constitute good repute, solvency, or fraudulent conduct. He may at will deal with each case as it arises and vary his course to suit his pleasure. He is at liberty to hear, if he chooses, only evidence unfavorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even the whim and caprice (if he gives them play) of the commissioner or of his assistant (subject to the commissioner's supervision) may not only halt, but injure and perhaps destroy a worthy business enterprise and cast a cloud on the name of the applicant or licensee, and when such applicant or licensee seeks redress in the courts he must assume the burden of disproving the findings made against him, however groundless they may be. Even an effort is in effect made to deny him access to the federal courts. Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. Rep., 1, C. C. A. 8. In given respects the above named law is more severe than that of any of the states whose "blue sky" laws have been held unconstitutional. They afforded some opportunity, at least, to the applicant to be heard when his right to do business was under investigation, and, when his business and good name were assailed, opened to him the doors of all the courts of the state for redress against adverse rulings and limited the burden of cost to which he might be subjected in consequence of an examination into his affairs.

A police regulation, like any other law, is subject to the equal protection clause of the fourteenth amendment. Atchison & Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56,

59. A statute does not deny the equal protection of the law if all persons brought under its influence are treated alike under the same conditions (Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 209) and if it does not subject the individual to an arbitrary exercise of the powers of government (Duncan v. Missouri, 152 U. S. 377, 382). The following illustrates wherein the act fails to meet the test thus prescribed: If more than fifty per cent. of the bonds of a given issue by a corporation are included in a sale to one purchaser, such issue is not embraced within the act (Sec. 6373-2) (1). The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the onerous provisions of the law, although its securities may be of the highest financial character. An owner who is not the issuer of the securities he holds is at liberty to dispose of his holdings for his own account regardless of the statute, providing he can do so without resorting to repeated and successive transactions of a similar character; but, if such transactions are expedient or necessary, he may not sell, unless, at inconvenience and financial cost and through delay and the commissioner's approving stamp of "good repute in business," he obtains a dealer's license so to do. A natural person who has not underwritten and is a **bona fide** owner of his securities, whether he be of good repute or not in business, may dispose of them for his own account, but the underwriter, although he may possess the same moral qualities and wealth as the natural person, or outrank him in both of these respects, may not dispose of his holdings, except by compliance with the none too clear provisions of the act. Although a natural person may dispose of his holdings as above indicated, a partnership or association may not do so. The exemptions based on market reports of a daily newspaper of general circulation (Sec. 6373-10) (b) and (e), would fail to embrace large numbers of meritorious issuers of the different classes of securities, for it is well known that many securities are not listed on the market or mentioned in any standard manual of information. Sec. 6373-10 (e) can have no application to an issuer, if some disposee is found who in a single transaction acquires securities of a given issue to the amount of five thousand dollars or more. There are many worthy concerns, each capitalized for a considerable sum, in which no one's investment reaches that amount. There would moreover seem to be no reason why, if some one person

who, risking that sum, should be defrauded, others should be cheated of smaller sums by sales of stock without the supervision which the law is intended to provide. A licensee may be relieved from giving information concerning the issuer of securities (Sec. 6373-10) (f), if the disposal of such securities is at a commission of less than one per cent. of their par value through a licensed member of a regularly organized and recognized stock exchange, having an established and lawfully conducted place of business in the state regularly open for public patronage, of all of which the commissioner is the sole judge. He may not be thus relieved, if the disposal is made by any one else.

The above observations upon the act have been made with full appreciation of Sec. 2, Art. XIII, of the Ohio constitution as amended September 3, 1912, the pertinent portion of which provides:

> "Corporations may be classified and there may be conferred upon proper boards, commissioners or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law."

It is to be regretted that the Supreme Court of Ohio has not been called upon either to construe this provision or to pass upon the statute now under consideration nor have we had the benefit of the discussion of this constitutional provision by counsel. We are, however, impressed with the belief that the provision cannot be so construed as to change the conclusions we have reached concerning the operation and effect of the statute. The effect of the constitutional provision, in our judgment, is simply to give distinct expression to powers which were plainly implied under the same section and article of the constitution of 1851, which provided that:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

It is settled by Berea College v. Kentucky, 211 U. S. 45, 57, that:

> "A power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a character granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.

Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass., 446, 451; Holyoke Co. v. Lyman, 15 Wall. 500, 522; Close v. Glenwood Cemetery, 107 U. S. 466, 476."

It was there further held that while the language of a statute may not in terms amend a charter, yet, where such appears to have been the legislative intent, the statute will be regarded as an amendment, Mr. Justice Brewer saying (p. 57):

> "It would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated."

It is also settled that where such power to alter or repeal a charter is reserved, it is competent for the legislature to repeal the charter as well as to amend it. Greenwood v. Freight Co., 105 U. S. 13; Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 258, 269, 270, 271; Shields v. State, 26 Ohio St. 86, 93, 94, aff'd. 95 U. S. 316, 324; State v. City of Hamilton, 47 Ohio St. 52, 73, 74. The most, then, that can be said of the statute in question is that its provisions operate to amend the articles of incorporation, the charters, of all domestic corporations that are in terms affected by the provisions of the act. It inevitably follows that these reserved powers include the power to supervise and regulate corporations. The consideration then of the present statute cannot be aided upon any theory that Sec. 2, Art. XIII, as amended, vests in the state legislature any greater power than it possessed under the old section and article; for manifestly there can be no difference between an express power and an implied power to do the same thing. It results that the constitutional validity of the present statute is to be tested by considerations practically the same as it would have been prior to the amendment in question. For example, a state is without power either through constitutional or statutory provision to avoid the effect and force of the commerce clause of the Federal Constitution; it hardly need be said that the statutory provisions before pointed out which directly impose burdens upon interstate commerce are of necessity violative of that clause; and, apart from everything else, it cannot be presumed that the legislature would have enacted the statute if it had understood that the provisions aimed against foreign corporations could not be sustained, since this alone would work an obvious discrimination against domestic corporations. Again, the power to supervise and regulate the business here involved was never before and cannot now be understood

to signify authority so to burden the business of domestic corporations as in practical effect to destroy it, regardless of its actual character and merit. We are not to be understood by anything said in this opinion to intimate that it is not within the power of the state legislature reasonably to regulate the business of corporations of its own creation or that of foreign corporations and joint stock companies which are operating within the borders of the state (Alabama & N. O. Transp. Co. v. Doyle, 186-187; Bracey v. Darst, 494, 495), such power of regulation being more extensive as to such artificial entities than as to individuals, copartnerships and voluntary associations. We do mean, however, to say, as we have already in effect stated, that the things attempted to be done by the present statute cannot be sanctioned under the guise of "supervisory and regulatory" measures in respect of the business of issuing and selling stocks and securities, whether of domestic or foreign corporations.

Other features of the act and other points argued have been considered; the treatment of the one and the discussion of the other would prolong this lengthy opinion and are not necessary.

The licenses mentioned in the first two of the above entitled causes expired on December 31, 1915. No occasion, therefore, exists, for enjoining their cancellation. The bill in each of them is drawn on narrow lines. The prayer of each, however, taken in conjunction with certain averments, is such as to warrant the temporary enjoining of the defendants therein named against enforcing or attempting to enforce the statute in question. In the third of the above cases, the motion filed by the defendants to dismiss is overruled. A temporary injunction is awarded in each case.

Interlocutory Injunction.—Filed February 28, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

Interlocutory Injunction.

This day the above entitled cause came on for hearing before the Honorable John W. Warrington, United States circuit judge, the Honorable John E. Sater, United States district judge, and the Honorable Howard

C. Hollister, United States district judge, upon the application of the above-named complainant for an interlocutory injunction in accordance with the prayer of his complaint and was argued by counsel for said complainant and said defendants, and was submitted to the court for determination. After consideration of the things alleged in the complaint and the arguments of counsel, in the opinion of the court, all of the three judges above named concurring, the act entitled:

> "An act to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio, and to prevent fraud in such sale,"

contained in Volume 103 of the Ohio Laws at pages 743-753, and the acts amendatory thereof, being the acts set forth in the bill of complaint filed herein, are violative of the Constitution of the United States, particularly of the interstate commerce clause and the clause prohibiting the deprivation of liberty and the taking of property without due process of law, and securing the equal protection of the law.

It is hereby ordered that the said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, and all his employes and subordinates and each of them individually be and they are hereby enjoined from attempting to enforce and enforcing the provisions of said acts and the acts amendatory thereto of the Ohio Legislature, and from interfering in any way with the business of the plaintiff, and from exercising further activities against the plaintiff in relation to the conduct of his business and from in any wise doing anything by virtue of or under favor of said acts prejudicial to the plaintiff, to all of which defendants except.

This injunction shall continue until the final decision of this case or the further order of the court.

Leave is given defendant to answer within five days.

Petition for Appeal.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

Petition for Allowance of Appeal to the Supreme Court.

The above-named defendant, Harry T. Hall, superintendent of banks and banking of Ohio, conceiving himself aggrieved by the decree made and entered on the

twenty-eighth day of February, 1916, in the above entitled action, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record of proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

This fourth day of March, 1916.

Harry T. Hall,
Superintendent of Banks, Etc.
By Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Clarence D. Laylin,
Solicitors for Defendants.

The foregoing appeal is allowed. Dated March 4, 1916.

J. E. Sater,
United States District Judge.

Assignment of Errors.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff,
vs.
Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

Assignment of Errors.

The defendant, Harry T. Hall, superintendent of banks and banking of Ohio, respectfully specifies as his reasons for appealing from the decree upon the twenty-eighth day of February, 1916, on the bill of complaint of plaintiff for an interlocutory injunction the following assignment of errors:

First: That the court erred in granting the interlocutory injunction against said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, his employes and subordinates, and each of them individually, from enforcing or attempting to enforce the provisions of Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, contained in Volume 103 of the Laws of Ohio, pages 743-753, and the acts amendatory thereof.

Second: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void, as being in violation of Section 8 of Article I of the Constitution of the United States.

Third: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void as being in violation of Section 1 of Article XIV of the Constitution of the United States.

The defendant therefore prays that the judgment heretofore rendered be reversed; that the interlocutory injunction therein allowed be dissolved and that the defendant be restored to all things he has lost by reason thereof.

Harry T. Hall,
Superintendent of Banks, Etc.
By Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Clarence D. Laylin,
Solicitors for Defendant.

Order Allowing Appeal.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

Order Allowing Appeal.

Upon motion of Edward C. Turner, attorney general of Ohio, solicitor for the defendant, it is ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered in this cause on the twenty-eighth day of February, 1916, be and the same is hereby allowed and it is ordered that a certified transcript of the record herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

J. E. Sater,
Judge, United States District Court, Southern District of Ohio, Eastern Division.

Appeal Bond.—Filed March 7, 1916.

Know all men by these presents, That we, Harry T. Hall, superintendent of banks of the state of Ohio, as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the state of New York, as sureties, are held and firmly bound unto Don C. Coultrap in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Don C. Coultrap, his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventh day of March, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a session of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said court between Don C. Coultrap, plaintiff, and the said Harry T. Hall, superintendent of banks of the state of Ohio, defendant, an order or decree was rendered against the said Harry T. Hall, superintendent of banks of the state of Ohio, defendant, and the said Harry T. Hall, superintendent of banks of the state of Ohio, defendant, having obtained an order of appeal and filed a copy thereof in the clerk's office of the said court to reverse the order or decree in the aforesaid suit, and a citation directed to the said Don C. Coultrap, plaintiff, citing and admonishing him to be and appear at a session of the United States Supreme Court on the .... day of ....next.

Now, the condition of the above obligation is such, That if the said Harry T. Hall, superintendent of banks of the state of Ohio, shall prosecute his appeal to effect, and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

Harry T. Hall, [Seal.]
Superintendent of Banks of State of Ohio.
American Surety Company of New York [Seal.]
By Thos. J. Davis,
Resident Vice President.

Attest:
L. H. McGowan.
Resident Assistant Secretary.

Sealed and delivered in presence of—
Margaret Crowley,
J. M. Elliott.
Approved by—
J. E. Sater,
District Judge.

Citation.

United States of America, Sixth Judicial Circuit, ss.:
To Don C. Coultrap—Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein Edward C. Turner, attorney general of the state of Ohio, and Harry T. Hall, superintendent of banks and banking of the state of Ohio, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, chief justice of the United States, this seventeenth day of March, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and fortieth.

J. E. Sater,
U. S. District Judge, Southern District of Ohio.

State of Ohio, County of Franklin, ss.:

On this twenty-first day of March, A. D. 1916, personally appeared before me, a notary public in and for said county, Henry S. Ballard, and made oath that he delivered a copy of within citation to Timothy S. Hogan, solicitor for appellee.

Henry S. Ballard.

Sworn to and subscribed before me this twenty-first day of March, 1916.

[Seal.] W. F. McNamara,
Notary Public in for Franklin Co., Ohio.

Service of copy of within citation acknowledged this twenty-first day of March, 1916.

Timothy S. Hogan,
Solicitor for Appellees.

Precipe.—Filed March 21, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

Precipe.

To the Clerk:

Please prepare transcript for appealing to the Supreme Court of the United States, under Section 266 of the Judicial Code, from the order made in the above entitled cause February 28, 1916, by Judges Warrington, Hollister and Sater, granting an interlocutory injunction, including in said transcript the following:

Copy of the following pleadings and documents:

(a) Bill of complaint.

(b) Affidavit of defendant, Harry T. Hall.

(c) Motion for temporary restraining order.

(d) Entry submitting case.

(e) Memorandum opinion filed by Judges Warrington, Hollister and Sater on February 10, 1916, granting temporary injunction.

(f) Order granting temporary injunction entered February 28, 1916.

(g) Petition for appeal.

(h) Assignment of errors.

(i) Order allowing appeal.

(j) Appeal bond.

(k) Citation with acknowledgment of service thereon.

(l) Precipe.

Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Attorneys for Defendants.

CLERK'S CERTIFICATE.

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, ..., clerk of the District Court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this...............day of..............., 1916.

(Seal.)

____

Clerk.

By______________________________

Deputy.

[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, ET AL., APPELLANTS,

vs.

WILLIAM R. [illegible] AND THE [illegible] MANUFACTURING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 7, [illegible]

([illegible])

(25,226)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 943.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, ET AL., APPELLANTS,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO MANUFACTURING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1916.

TRANSCRIPT OF RECORD.

Bill of Complaint.—Filed December 7, 1915.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Bill of Complaint.

1. The plaintiff, William R. Rose, is a citizen of the state of Ohio, and has been a resident of the city of Cleveland in said state for more than three years last past. During said entire time, the said Rose has been engaged throughout the entire state of Ohio, and especially in the city of Cleveland, in the buying and selling of investment securities and particularly the stocks and bonds of industrial corporations, and that during said entire period he has been actively engaged in the marketing of the kinds of securities aforementioned and has built up and maintained a large and profitable business and an enviable reputation as a dealer in stocks and bonds of substantial value to investors.

The plaintiff, The RiChard Auto Manufacturing Company, is a corporation organized and existing under and by virtue of the laws of the state of West Virginia, with its principal office and place of doing business in the city of Cleveland, county of Cuyahoga, and state of Ohio. Said company was organized for the purpose of manufacturing and selling to the trade an automobile to be made upon the plans, designs and specifications drawn and perfected by one Francois RiChard under patents obtained by said RiChard and covering all the essential parts of said machine and devices for its manufacture and giving to said patentee an exclusive property therein, said RiChard being under contract with said plaintiff, The RiChard Auto Manufacturing Company, to sell, transfer and assign to it all of his right, title and interest in and to said patents and patent rights, designs, pattens and dies, and that said plaintiff, The RiChard Auto

Manufacturing Company, is now the equitable owner of said above-mentioned things and is now ready, prepared and equipped to manufacture such automobile so soon as, and not until, the stock of said company can be put upon the market, offered for sale and sold and a sufficient amount realized therefrom for such purposes.

2. Plaintiffs say that on the twenty-fifth day of September, A. D. 1914, and for a long time prior thereto, said William R. Rose, as aforementioned, was actively engaged in the buying and selling of the stocks and bonds of industrial corporations and investment securities in general and in particular of the stock of said The RiChard Auto Manufacturing Company, of which company on said last mentioned date he was the secretary.

Said Rose, by unusual aptitude or comprehension of the mechanism and construction of automobiles and by careful study thereof of this particular RiChard car, had become especially qualified for the selling of said stock and was able to prosecute the same for the benefit of said corporation, of himself and investors therein more successfully than any other man whose services were available to said corporation.

That on said twenty-fifth day of September, A. D. 1914, he, the said Rose, was arrested in said county of Cuyahoga, Ohio, by a constable of the court of one Henry M. Calvert, justice of the peace in and for said county, upon an affidavit filed in said court and sworn to by one H. R. Young, a subordinate and deputy of the state superintendent of banks and banking for the state of Ohio, and under whose immediate directions and control he was at said time acting. That upon such arrest, said plaintiff Rose was taken before said Calvert, justice of the peace, hearing waived and said Rose was bound over to the grand jury of Cuyahoga county, Ohio, which said jury returned an indictment against him charging him with a violation of an act passed by the legislature of the state of Ohio at the regular session of 1913, said act being entitled an act "To regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sale," which said act is contained in Volume 103 of the Laws of Ohio, pages 743 to 753 inclusive, as amended by the passage of an act entitled "To amend Sections 6373-1, 6373-2, 6373-3, 6373-4, 6373-5, 6373-6, 6373-7, 6373-8, 6373-9, 6373-10, 6373-11, 6373-12, 6373-13, 6373-14, 6373-15, 6373-16, 6373-24 of the General Code of Ohio, to further regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sales." Said amendatory act is found

in Volume 104 of Ohio Laws, page 110 to 119 inclusive, and that said proceedings are still pending.

Plaintiffs say that said plaintiff Rose was charged in said indictment with a violation of said act because of his attempt to dispose of and sell the stock of said plaintiff, The RiChard Auto Manufacturing Company, without having complied with the requirements of said act.

3. The plaintiffs aver that the legislature of the state of Ohio at the regular session of 1913 passed an act entitled "To regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sale," which said act is contained in Volume 103 of the Laws of Ohio, pages 743 to 753, inclusive, which said act was duly approved by James M. Cox, governor of said state of Ohio at the special session of the Eightieth General Assembly which began January 14, 1914, amended said law by the passage of an act entitled "To amend Sections 6373-1, 6373-2, 6373-3, 6373-4, 6373-5, 6373-6, 6373-7, 6373-8, 6373-9, 6373-10, 6373-11, 6373-12, 6373-13, 6373-14, 6373-15, 6373-16, 6373-24, of the General Code of Ohio, to further regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sales, which said amendatory act was approved by the governor of said state on February 17, 1914, and filed in the office of the secretary of state on February 19, 1914, which said amendatory act is found in Volume 104 of Ohio Laws, pages 110 to 119, inclusive; that the legislature of the state of Ohio at the special session of 1914, which began July 20, 1914, amended said amendatory act as appears in part of an act entitled "An act to amend Sections 712, 714, 716, 724, 736, 742-3, 742-4, 742-5, 742-9, 742-16, 6373-16 and 12898 of the General Code relative to the duties of the superintendent of banks and banking as appears in Volume 105-106, pages 363 and 364, inclusive. Attached hereto and made a part hereof is a copy of all sections of said original act and said amendatory acts which now purport to be in force and which are unrepealed. Said copy is marked Exhibit A and is a copy of what is known as the Blue Sky Law and which will be found in Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio to which reference is hereby made.

IV. Plaintiffs say that the defendant, Harry T. Hall, is now the duly appointed, qualified and acting superintendent of banks and banking of the state of Ohio, and as such, is actively engaged in the prosecution of said proceedings now pending in the county of Cuyahoga, state of Ohio, against the said plaintiff, William R. Rose, and is assisting and advising with the defendant,

Cyrus Locher, prosecuting attorney of said Cuyahoga county in said prosecution, and has, together with said prosecuting attorney, interfered with, interrupted and completely prevented said plaintiff Rose from the prosecution and carrying on of his business in the state of Ohio as a dealer in stocks, bonds and investment securities, under pretense of enforcing said unconstitutional, invalid and void acts and statutes above mentioned, and threatens to and will, under pretense of enforcing said unconstitutional statutes, unless restrained, prevent said plaintiff, William R. Rose, from the further prosecution or any attempted carrying on of his said business as such dealer in stocks and bonds, and especially any attempt upon the part of said Rose to dispose of and sell the stock of said plaintiff, The RiChard Auto Manufacturing Company, and that said defendant, Cyrus Locher, the prosecuting attorney of said Cuyahoga county, Ohio, together with the defendant, William T. Smith, the sheriff of said county, unless restrained, will assist and actively cooperate with said defendant, Harry T. Hall, in so preventing said Rose, to the great and irreparable injury to both of these plaintiffs.

5. The plaintiffs aver that said act of the legislature of 1913, and said amendatory acts and each of them are unconstitutional, invalid and void: (1) Because they deprive the plaintiffs of their right to sell in the state of Ohio valuable stocks, bonds and securities which is depriving them of their property without due process of law; (2) that they deny the plaintiff equal protection of the laws as guaranteed to them under the 14th amendment of the Federal Constitution; (3) that said acts impose a burden upon and practically amount to prohibition of interstate commerce which is contrary to Section 8 of Article 1 of the Constitution of the United States; (4) because said acts attempt to place in the superintendent of banks and banking of the state of Ohio legislative, executive and judicial powers, which is contrary to Articles 1, 2, 3 and 4 of the Constitution of the state of Ohio; (5) because said acts delegate to the superintendent of banks and banking of the state of Ohio legislative and judicial powers, which is in violation of the Constitution of the state of Ohio, (6) because said acts and each of them are in violation of Article 5 of the Constitution of the United States, in that they deprive the plaintiffs of their property without due process of law; (7) that said acts are violative of the bill of rights of the state of Ohio in that they deny to the plaintiffs the guaranteed right to acquire and enjoy property; and (8) in that the provisions of said act are violative of Section

26 of Article 2 of the Constitution of the state of Ohio which requires the uniform operation throughout the state of all the laws of a general nature.

6. The plaintiffs aver that if the said defendants and each of them are permitted, under pretense of enforcing said unconstitutional, invalid and void acts and statutes, they will give great publicity, as indeed they already have, to said proceedings and will prevent the said plaintiff from conducting and prosecuting his said business free from the interference of said officials acting under said void law; that said plaintiff Rose will be deprived of the profits arising from the operation and conducting thereof; and the said plaintiff, The RiChard Auto Manufacturing Company, will be irreparably injured thereby by the interruption and prevention of its steps to complete its organization and capitalization for the perfect operation which it contemplates in the construction and placing on the market of automobiles constructed according to said Richard's patents and designs. The great capacity, experience and ability of said RiChard in the designing and specifying of various parts of automobiles and the superiority of said car are shown in the affidavit of said Richard hereto attached and marked Exhibit B, to which reference is hereby made, and the plaintiffs say that because of the very nature of such RiChard automobile, of the peculiar knowledge and experience of said plaintiff, William R. Rose, of the workings and parts of the same, and of the peculiar intimate relations and knowledge of these plaintiffs of and with one another, such proceedings of these defendants and such further attempts as are threatened against these plaintiffs and both of them will cause irreparable loss and damage to said plaintiffs and to their said businesses respectively.

7. The plaintiff being remediless, save and except in a court of equity, where matters of this kind are alone and properly cognizable, prays that the defendants, and each of them, be made parties to this bill and that proper process shall issue against them and each of them; that a restraining order be issued by this honorable court enjoining, inhibiting and restraining the said defendants and each of them from the the further prosecution of said criminal proceeding and from in any wise interfering with either of said plaintiffs or attempting to interfere with said plaintiffs in the prosecution and financing of said The RiChard Auto Manufacturing Company, and from interfering with said plaintiff Rose in the prosecution of the said business as a dealer in industrial securities or from attempting to act in virtue of or under favor of said unconstitutional, invalid and void statutes and

pretended laws aforesaid, or from in any wise interfering with either of said plaintiffs in the continuation of their business as hereinbefore referred to; that upon a preliminary hearing an interlocutory injunction be granted declaring said acts and each of them of the legislature of Ohio invalid, unconstitutional and void; that at said preliminary hearing an interlocutory injunction be granted enjoining, inhibiting and restraining said defendants and each of them from doing any of the things hereinbefore threatened and complained of, and enjoining them from interfering with, preventing, molesting or threatening the plaintiff Rose in the sale or soliciting of the sale of stock of the plaintiff, The RiChard Auto Manufacturing Company, or other stock as hereinbefore referred to, and from the peaceable and unmolested continuance of his business, and upon the final hearing of this case, such interlocutory injunction to be made perpetual, and that in the said restraining order and in the said interlocutory injunction and by the terms thereof, the said defendants and each of them be enjoined from any further activities against these plaintiffs in relation to the sale of said stock or other securities or in the conduct of their business, and for such other, further and general relief as under the facts and circumstances of this case, this honorable court may see fit to grant or as to equity may seem meet and proper.

And for this the plaintiffs will ever pray, etc.

William R. Rose,
The RiChard Auto Manufacturing Co.,
a Corporation,
By B. J. Sawyer, Their Attorney.
John A. Shauck, and
Francis R. Marvin,
of
Marvin & Marvin, Of Counsel.

State of Ohio, County of Franklin, ss.

This day personally appeared before the undersigned, a notary public in and for Franklin county, Ohio, William R. Rose, who, after being first duly sworn, upon oath says that he is one of the plaintiffs in the above action. That he has read the said bill and knows the contents thereof, and that the facts and statements therein contained are true.

Wm. R. Rose.

Sworn to and subscribed in my presence by the said William R. Rose, this seventh day of December, 1915.

Henry W. Dillon,
Notary Public in and for the County and State Aforesaid.

Plaintiff's "Exhibit A."

An Act.

Sec. 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed "securities") evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided.

Sec. 6373-2. The term "securities," as used in this act, shall not be deemed to include conveyances of real estate; or, where the same have not been judicially declared invalid, and where, at the time of such sale, there is no default in payment of any part of the interest or principal of the same:

1. Mortgage bonds and notes (other than corporate bonds where more than fifty per cent. of the entire issue is not included in a sale to one purchaser) secured by a bona fide mortgage on real estate:

2. Securities of quasi-public corporations, the issuance of which has been authorized by the public service commission of this state;

3. The stock or obligation of any national bank, or of any bank, trust company or building and loan association, organized under the laws of this state and subject to examination and supervision by the proper authorities thereof.

The term "dealer," as used in this act, shall be deemed to include any person or company, except national banks, disposing or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a bona fide owner of the security and disposes of his own property for his own account;

(b) One who, in a trust capacity created by any law of the United States or of this or any other state or by judicial authority, lawfully disposes of any property embraced within such trust;

(c) A bank or trust company, organized under the laws of this state and subject to examination and supervision by the proper authority thereof, selling a security for a licensee, other than the issuer or underwriter thereof, at a commission of not more than two per cent., where such bank or trust company is not a regular dealer in securities;

(d) One, not the issuer, who disposes of securities to a licensee under this act or to a company which, as a part of its regular business, deals in or holds such securities;

(e) A pledgee, selling in the ordinary course of business, a security pledged to him as security for debt in good faith and not for the purpose of avoiding the provisions of this act;

(f) The issuer, organized under the laws of this state where the disposal in good faith and not for the purpose of avoiding the provisions of this act, is made for the sole account of the issuer, without any commission and at a total expense of not more than two percentum of the proceeds realized therefrom plus five hundred dollars and where no part of the issue to be disposed of is issued, directly or indirectly, in payment for patents, services, good will or for property not located in this state; provided that the president and secretary, or the incorporators if done before organization, of the issuer shall, prior to such disposal, file with the "commissioner" a written statement setting forth the existence of all such facts and that such issuer is formed for the purpose of doing business within this state.

As used in this act, the term "company" shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; "dispose of" shall be construed to mean "sell, barter, pledge or assign for a valuable consideration or obtain subscriptions for"; "issuer," the original issuer of the security; and, where the context demands it, words in the present tense include the future tense; in the masculine gender include the feminine and neuter gender; in the singular number include the plural, and in the plural, the singular number; the word "whoever" includes all persons, natural and artificial, principals, agents and employees; "and" may be read "or," and "or" "and".

Sec. 6373-3. Before such license shall be issued to any dealer, there shall be filed by him with the superintendent of banks, herein termed the "commissioner," together with a filing fee of five dollars, an application for such license, together with information, in such form as

shall be determined by such "commissioner," setting forth:

(a) The names and addresses of the directors and officers if such applicant be a corporation or association and of all partners if it be a partnership, and of the pers if the applicant be an individual, together with the names and addresses of all agents of such applicant assisting in the disposal of such securities;

(b) Location of the applicant's principal office and of his principal office in the state, if any;

(c) The general plan and character of the business of said applicant, together with references which the "commissioner" shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners and agents.

If the applicant be a corporation organized under the laws of any other state, territory or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation certified by the proper officer of such state, territory or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement.

The applicant at the same time shall also file with said "commissioner" a duly executed written instrument, irrevocable, consenting that any action brought against such applicant, arising out of and founded upon the fraudulent disposal of such securities by him or his agents, may be brought in Franklin county, and that, in the event that proper service of process cannot be had upon such applicant in such county, service of process made therein by the sheriff of such county, by sending a copy thereof by registered mail, at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application or such other place as the applicant may thereafter designate in writing filed with the "commissioner," shall have the same effect as if personally made upon the applicant according to the laws of this state.

Sec. 6373-4. Notice of all applications for registration as a licensed dealer in such securities shall be published in a daily newspaper of general circulation in the city where the applicant's principal place of business in the state is located, or in the city of Columbus, if the applicant has no such place of business in the state, and no such application shall be acted on by the "commissioner" until the expiration of one week from the date of such publication, but shall be acted upon within twenty days after proof of such application has been filed with him.

If the "commissioner" be satisfied of the good repute in business of such applicant and named agents, he shall, upon the payment of an annual fee of fifty dollars, and an additional fee of five dollars for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon payment of such annual fee, unless revoked as herein provided. The expense of all publications provided for in this act shall be paid by the applicant for license. Pending a final disposition of such application the "commissioner" may grant temporary permission to such applicant to transact business as a dealer under this act. All such renewals shall be made as of the first day of January in each calendar year upon proper application therefor, filed not less than twenty nor more than sixty days next preceding such date.

Sec. 6373-5. Such license shall be taken out at the beginning of each calendar year, but it may be issued at any time for the remainder of such year, and in such case the annual fee shall be reduced four dollars for each expired month, but in no case shall it be less than ten dollars. Upon the payment of a fee of five dollars for each specified agent not named in such license the same may at any time be amended or supplemented to include such agent. Upon the written request of such applicant, accompanied by a fee of two dollars, such license shall be revoked as to any agent or agents of such applicant, and an amended license shall thereupon be issued for such applicant and his remaining agents; and thereafter the applicant shall not be bound by the acts of the agent whose license has been revoked. Notice of such amendments shall also be published as aforesaid.

Sec. 6373-6. Such "commissioner" may at any time revoke any such license, or refuse to renew the same, upon ascertaining that the licensee:

(a) Is of bad business repute;

(b) Has violated any provision of this act; or

(c) Has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions.

No dealer whose license has been revoked shall be relicensed within six months from the date of such revocation.

The "commissioner" shall at once lay before the prosecuting attorney of the proper county any evidence which shall come to his knowledge of criminality under this act.

Sec. 6373-7. At least five days before revoking or refusing to grant or renew a license, the "commissioner"

shall send by registered mail to the licensee, at the address named in the application written notice of his intention so to do, specifying therein the reasons for such revocation or refusal.

Sec. 6373-8. Any one whose license shall be refused or revoked or to whom a renewal of license may be denied, may file, within thirty days thereafter, in the court of common pleas of Franklin county, a petition against the "commissioner," officially, as defendant, alleging therein, in brief detail, the plaintiff's qualifications to be licensed and praying for a reversal of the official action complained of. Upon service of summons upon said defendant, returnable within three days from its date and otherwise made as in civil actions, he shall, within one week from such return day, file an answer, in which he shall allege by way of defense the grounds previously assigned in his notice to such applicant or licensee, and such other grounds as shall, in the meantime, accrue or be discovered. All allegations of the answer shall be deemed to stand denied without further pleading and, upon application of either party, the cause shall be advanced and heard without delay. Merely technical irregularities in the procedure of such "commissioner" shall be disregarded and the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of. The court's decision shall consult only the rights of the plaintiff and the protection of the public and the "commissioner" shall prosecute no proceedings to obtain a reversal, modification or vacation of a judgment rendered in favor of the plaintiff and in such event, shall forthwith issue the license applied for. A judgment sustaining the refusal of the "commissioner" to grant or renew a license shall not bar, after thirty days, a new application by plaintiff for a license, nor shall a judgment in favor of the plaintiff prevent such "commissioner" from thereafter revoking such license for any proper cause which may thereafter accrue or be discovered.

Sec. 6373-9. Before such licensee shall dispose of any of such securities, within this state, he shall file with such "commissioner," in such form as shall be determined by him, the following information concerning such securities, if issued by any company:

(a) The name, location of principal office of the issuer and the names of its officers and directors, or if a copartnership, the partners;

(b) A statement of the issuer, showing in general detail, the assets and liabilities, and capital stock of the issuer, as of a date as late as the close of its last fiscal

year, and of its gross income, expenses and fixed charges, for one year last prior thereto, or for such time as the issuer has been in business, if less than one year;

(c) A pertinent description of such securities, and the purpose of said issue, and

(d) Unless the foregoing information be executed under the provisions of the following section, the approximate price at which the licensee purposes to dispose of such securities.

If the securities be of a taxing subdivision of any other state, territory, province or foreign government, and are not an obligation of the entire taxing subdivision and payable out of the proceeds of a general tax, there shall be filed the information required by paragraphs (c) and (d) of this section and, in addition thereto, a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the same is secured and that, to the best of his knowledge, there is no default in the payment of any part of the interest or principal of such securities and are no adjudications adversely affecting, or pending suits questions the validity of the same.

Sec. 6373-10. The information required in the preceding section need not be filed:

(a) Unless required by the "commissioner," if the same has been filed by any other licensee; or

(b) If actual current sales of the securities, at prices quoted, shall have been, from time to time, for not less than six months next preceding such disposal, published in the regular market reports of the news columns of a daily newspaper of general circulation in this state; or

(c) Where there is a disposal of securities, the price paid or considered rendered for which, in a single transaction, by one disposee, shall amount to five thousand dollars or more; or

(d) Where the securities disposed of are those of manufacturing or transportation companies, or of common carriers or other public utilities, issued and outstanding in the hands of bona fide purchasers for value, prior to March 1, 1914, where such companies were, on said date, and shall be, at the time of sale, actual going concerns, either directly or through lessees, and where there shall be at the time of sale no default in payment of any part of the interest or principal of such securities; or

(e) Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by such "commissioner"; or

(f) Where the disposal is made for a commission of less than one percentum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted place of business in this state, regularly open for public patronage as such.

Sec. 6373-11. Every dealer, before or at the time of circulating the same, shall furnish to the "commissioner" one copy of each prospectus, circular or other document of like nature and of each advertisement circulated by him in connection with the sale of any securities concerning which information is required to be filed under the provisions of Sections 6373-9 and 6373-10 of the General Code.

Sec. 6373-12. No person or company shall, for the purpose of organizing or promoting any insurance company, or of assisting in the flotation of its stock after organization, dispose or offer to dispose, within this state, of any such stock, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language:

"No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of........per cent. of the amount actually paid upon separate subscriptions, or, in lieu thereof there may be inserted, '$........per share from every fully paid subscription,' and the remainder of such payments shall be invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be) and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefor by proper authority."

The amount of such commission, promotion and organization expenses shall in no case exceed fifteen per cent. of the amount actually received upon the subscription.

Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid.

Sec. 6373-13. Whoever, with intent to secure financial gain to himself, advises and procures any person to purchase any security and receive for such advice or services any commission or reward from the owner or salesman thereof, without disclosing to the purchaser the fact of

his agency or his interest in such sale shall be liable to such purchaser for the amount of his damage thereby, upon tender of such security to, and suit brought against, such adviser, within one year subsequent to such purchase.

Sec. 6373-14. For the purpose of organizing or promoting any company, or assisting ~~in the flotation of the~~ securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until shall commissioner shall issue his certificate as provided in Section 6373-16 of the General Code, which shall not be done until, together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in Section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of Section 6373-9 of the General Code, the following:

(a) A certified copy of the articles of incorporation or association of the issuer, its regulations and by-laws;

(b) Certified copies of all minutes of stockholders and directors relative to the issue of such securities;

(c) A sworn statement made by the president and secretary of the issuer, showing in detail the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment;

(d) Like certified copies of all contracts or agreements between the issuer and any underwriter of such securities, and, if disposed of by the issuer, all contracts and agreements relative to the sale and disposition thereof; and any such contracts or agreements made subsequent thereto shall be filed immediately upon the execution thereof;

(e) All contracts made between such underwriter and any salesman, agent or broker.

This section shall not apply where the issuance of the securities has been approved by the public service commission or like body of any state of the United States or any province of the Dominion of Canada, or where the sale is made by or on behalf of an underwriter who, in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him and pays therefor, in cash or its equivalent, before attempting to sell the same, not less than ninety percentum of the price at which such securities are thereafter sold by him; nor where the securities are those of

a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal mining or quarrying, and the whole or a part of the property upon which such securities are predicated is located within this state; nor of a real estate or building company all of whose property, upon which such securities are predicated, is located in this state; nor in the case of an issuer excepted under paragraph (f) of Section 6373-2, General Code; nor in cases where the filing of information is dispensed with under the provisions of paragraphs (b), (d), (e) or (f) of Section 6373-10, General Code.

The information required by paragraphs (d) and (e) of this section shall be for the information of the commissioner only, and shall not be disclosed by him except when lawfully required in a judicial proceeding.

Sec. 6373-15. No person or company, unless licensed in the manner and under the conditions applicable thereto hereinbefore provided for dealers, shall, within this state deal in real estate not located in Ohio of which he is not the actual and bona fide owner and unless the "commissioner" shall issue his certificate as provided in the following section, and prior to such issuance there shall, together with a filing fee of five dollars, be filed with the "commissioner" an application for such certificate, and a written statement of the applicant containing a pertinent description of the real estate the sale of all or a part of which is sought to be made, the nature and source of the title of the owner thereto, and the amount or value and the nature of the consideration paid or allowed by him therefor, it shall, within this state, be unlawful:

(a) For any corporation, association or co-partnership doing business under any name other than the name or names of such persons or of all the members of such association or co-partnership to sell any real estate not located in Ohio;

(b) For any person or company engaged in the business of dealing in real estate to sell or offer for sale any such real estate, the title to which is or is represented to the purchaser to be in the name of a corporation or unincorporated company, or of a person doing business under a fictitious name.

This section shall apply where the title to such property is held in the name of a trustee for any corporation or for any such described person or company; but it shall not be deemed to prohibit the disposal by an owner of his own property, in good faith and not for the purpose of avoiding the provisions of this act, where the transaction

is not one of repeated transactions of a similar nature, performed as a part of the business of dealing in real estate; nor shall it be deemed to prohibit a railroad company having an immigration bureau or department from advertising either directly or through its accredited representatives, the fact that there are along its route lands for colonization or sale; provided that such advertising be not of specific tracts of real estate, and not for the purpose of avoiding the provisions of this act.

Sec. 6373-16. Said "commissioner" shall have power to make such examination of the securities or of the property named in the next preceding sections as he may deem advisable; and if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and in the case of securities that the issuer is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. But if it shall not affirmatively so appear he shall so notify the applicant, in writing, and of his refusal to issue such certificate. Such certificate shall be issued or refused within a reasonable time after the filing of the application therefor, which shall be within not more than thirty days from and after the applicant has fully complied with all requirements of this act precedent thereto. Such applicant shall have the same right of review of such finding as is given to a dealer by Section 6373-8. The fee provided for in this section shall not be required of an applicant who is licensed as a dealer.

Sec. 6373-17. Such certificate shall recite in bold type that the "commissioner" in no wise recommends such securities or other property; and no person or company shall advertise, in connection with the sale of such securities, the fact that such certificate has been issued unless such advertisement also contains in bold type a copy of such recital.

Sec. 6373-18. In addition to the liability now imposed by law, any person or company that, by written or printed circular, prospectus, statement or advertisement of any kind, shall offer for subscription or purchase any security, or receive the profits accruing from the disposal of securities so advertised, shall be liable to any person who, on the faith of such advertisement or document, acquires such security, for the loss or damage sustained by him by reason of any untrue statement contained therein, unless such person or company shall establish that he or it had no knowledge or notice of the

publication of such advertisement prior to the transaction complained of, or had just and reasonable grounds to believe the statements thereof to be true. Wherever any corporation shall be so liable, the directors thereof shall also be, under like limitations, jointly and severally liable. Any such director, upon the payment of a judgment so obtained against him, shall be subrogated to the rights of the plaintiff against such corporation and shall have the right of contribution for the payment of such judgment, under like limitations, against any of his fellow directors. Lack of reasonable diligence to ascertain the fact of such publication the falsity of any statement therein contained, shall be deemed to be knowledge of such publication and of the falsity of any untrue statement thereof. Any action brought against such director, based upon the liability hereby imposed, shall be brought within two years after the acquisition of the security by any person so damaged or after payment of the judgment for which contribution is sought.

Sec. 19. If the issuer of such securities be a company incorporated, organized or formed to make any insurance named in subdivisions I and II, division III, title IX of the General Code, the "commissioner," for all the purposes named in sections 14 and 16 of this act, shall be the superintendent of insurance of this state. In addition to the powers given to, and the duties prescribed to be performed by, such "commissioner," under such sections, the superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state.

Sec. 20. Whoever knowingly makes any false statement of fact in any statement or matter of information required by this act to be filed with the "commissioner," or in any advertisement, prospectus, letter, circular or other document, containing an offer to dispose or solicitation to purchase, or commendatory matter concerning such securities or real estate, with intent to aid in the disposal of the same, or whoever knowingly violates any of the provisions of sections 12, 14 or 15 of this act, or for the purpose of aiding in the disposal of any security or real estate, knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the penitentiary not more than one year or both; and whoever violates any of the other pro-

visions of this act shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned in the county jail or workhouse not more than sixty days, or both.

Sec. 21. In any prosecution brought under this act, the accused shall be deemed to have had knowledge of any matter of fact where in the exercise of reasonable diligence, he should, prior to the commission of the offense complained of, have secured such knowledge. Information and indictments under this act need not negative any of the exceptions enumerated in sections two, ten and fourteen hereof.

Sec. 22. Nothing herein contained shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of this act, for the violation of any other statute or of any other provision hereof.

Sec. 23. Nothing herein contained shall be so construed as to impair the obligation of prior contracts.

Sec. 24. The superintendent of banks, as "commissioner" under this act, is hereby authorized to appoint an assistant commissioner and such clerks as are actually necessary to carry out the provisions of this act and to fix their salaries; such appointments and salaries to be subject to the approval of the governor. Subject to the supervision of such "commissioner," the assistant commissioner may perform all the duties imposed upon, and have all the powers granted to such "commissioner" under the provisions of this act. All fees received hereunder by the "commissioner" shall be deposited by him with the treasurer of state upon the warrant of the auditor of state.

Plaintiffs' Exhibit B.

The State of Ohio, Cuyahoga County, ss.:

Francois Richard being first and duly sworn upon his oath, says that he is forty-one (41) years of age, that he was born in France, that he has resided in America for the past eleven years, that he has his offices at 1147 Engineers Building, Cleveland, Ohio, that he graduated at the School of Arts and Manufacturers at Paris, France, as a mechanical engineer, twenty-two (22) years ago.

Since his graduation he has spent his whole time in the designing and building of automobiles and other machinery, that in this country he has made twelve hundred and sixty-five (1265) original designs for automobiles and machines.

That some of these design called for them five (5) to six hundred (600) distinct drawings.

Affiant says that he designed and built the first eight-cylinder automobile in the world in the year of 1904-05, that he designed the first fore door body now universally used in the year 1906.

Affiant says that he was the first man to exhibit an automobile, that said exhibit took place in Paris, France, in the year 1892, that in the year 1904 affiant says that he was awarded a gold medal at St. Louis for Carbureter.

Affiant says that during the time that he has been designing for other things that he has spent a great portion of his time for the past eleven (11) years in designing and perfecting and building an automobile to bear his name different in construction and working from those now on the market that in the carrying of said work he has expended a sum of three hundred thousand ($300.000.00) dollars that he has recorded seven (7) patents on different parts including patents on carbureter that he has patterns, designs, dies, and that at the time of the arrest of Wm. R. Rose who was trying to perfect an organization for the construction of said automobile he had in his possession twelve hundred and eighty-five (1285) Valid Contracts for said cars; that he had already built and constructed along the lines to be followed in the manufacture of the Richard car, seventy-five (75) cars, known as the "Only Car," which said cars were built and satisfactorily used.

Affiant says that the new car to be known as the Richard car is a contemplated perfection of the principle used in the "Only Car."

Affiant says that as a preliminary step in an effort to properly finance the building and sale of the RiChard car, that incorporation papers were taken out under and by virtue of the laws of the state of West Virginia.

That the capital stock of said corporation was two hundred and fifty thousand ($250,000.00) dollars in common stock, at one hundred ($100.00) dollars per share and one hundred thousand ($100,000.00) dollars preferred stock at one hundred ($100.00) dollars per share, that said preferred stock was 7 per cent. profit-sharing stock.

Affiant says that at the time of the arrest of Mr. Wm. R. Rose, who was acting as secretary for the Richard Automobile Company, organized as aforesaid, under the state laws of West Virginia, he has entered in a contract with said company that upon the sale of two hundred and fifty thousand ($250,000.00) dollars worth of preferred stock in cash to sell and transfer all his rights, title, and interest in and to above-mentioned, dies, patterns, designs, patents and contracts for the exclusive

use of the manufacture of said Richard automobile for the common stock.

Affiant says that said contract with the Richard Automobile Company was fair and just and equitable, that the investment in the preferred stock was a good investment, that it was offered upon a fair and equitable basis, and that had said proposition been carried out, it would have been made a good investment for all concerned and would have added a profitable business to the commonwealth of Ohio.

Affiant says that no stock had been issued in said Richard Automobile Company except that which was necessary to form an incorporation, which was twenty-five (25) shares to five (5) subscribers.

Affiant says that while said contract has not been carried out that he has continued the work of developing and manufacturing of said Richard automobile and that by the middle of January a number of said machines will be placed upon the market for sale.

Affiant says that the general characteristics of said machine lies in a long stroke, making it possible to give the maximum and minimum speed on high and to decrease the vibration caused by the running of the engine.

Further affiant says not.

Francois Richard.

Subscribed and sworn to before me, a notary public, this sixth day of December, A. D. 1915, at Cleveland, Cuyahoga county, Ohio.

[Seal.] W. E. Skeel,
Notary Public.

My commission expires Jan. 27, 1917.

Notice.—Filed December 8, 1915.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County of Ohio, Defendants.

[No. 53.]

Notice.

To the Honorable Frank B. Willis, Governor of Ohio; the Honorable Edward C. Turner, Attorney General of Ohio, and to the Defendants Above-named and Each of Them:

Please take notice that the above-named plaintiffs in the above styled cause have made application to the Honorable John E. Sater, judge of the United States District Court for the Southern District of Ohio, Eastern Division, for an interlocutory injunction restraining the defendants above named and each of them from enforcing against the plaintiffs an act passed by the legislature of the state of Ohio at the regular session of 1913 as amended at the special session of the Eightieth General Assembly of Ohio, which began January 14, 1914, said act being entitled "To regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio, and to prevent fraud in such sale," popularly known as the Blue Sky Law, and that a hearing upon application for said interlocutory injunction is set for a date hereinafter to be determined at Cincinnati, Ohio, to be heard before the said judge and two other federal judges as required by law.

A copy of the bill in the above styled cause and a copy of the restraining order therein entered by the abovenamed judge are attached hereto.

William R. Rose,
The Richard Auto Manufacturing Company,
By B. J. Sawyer.
John A. Shauck,
Francis R. Marvin,
Their Solicitors.

Restraining Order.—Filed December 8, 1915.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Restraining Order.

This eighth day of December, 1915, came the plaintiffs in the above styled suit by their counsel, John A. Shauck and Francis R. Marvin, and presented to the undersigned district judge of the United States Court for the Southern District of Ohio, Eastern Division, their bill of complaint duly filed with certain affidavit and exhibits attached thereto, and made application to the said judge for an interlocutory injunction enjoining, inhibiting and restraining the said defendants from enforcing the act and amendments thereto passed by the General Assembly of Ohio, as set forth in the bill of complaint herein, popularly known as the Blue Sky Law, on the ground that the same is unconstitutional and void. At the same time moved the said judge for a restraining order inhibiting, enjoining and restraining the said defendants from arresting the said plaintiffs or either of them under said statutes or otherwise interfering with the business of said plaintiffs or either of them.

And the said judge being satisfied that this is a proper case for a temporary restraining order, doth adjudge further and decree that said defendants and each of them be restrained from arresting or molesting said plaintiffs or either of them for alleged violations of said act and from interfering with the business of said plaintiffs as set forth in their said petition until the hearing upon such application for interlocutory injunction can be had before three judges as provided for by Section 266 of the Judicial Code of the United States, and the court now fixes the time for said hearing at the ——— day of December, 1915, said hearing to be in the rooms of the District Court or of the United States Circuit Court of Appeals in the city of Cincinnati, Ohio, as may hereafter be determined.

But this restraining order shall not in any wise operate to prevent said further proceedings in the Court of Common Pleas of Cuyahoga county, Ohio, as that court and its officers, including two last named defendants, may desire to take in the cause brought into that court before the filing of the bill of complaint herein.

It is further ordered that the plaintiffs do serve upon each of the defendants named herein a copy of the bill of complaint and that the clerk of court mail to said defendants and each of them copies of this restraining order.

J. E. Sater, Judge.

Motion to Dismiss.—Filed December 27, 1915.

In the District Court of the United States, Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Motion to Dismiss.

Now come defendants and move the court as follows (each separately):

(1) Defendants move that the bill herein on behalf of The RiChard Auto Manufacturing Company, a corporation organized and existing under the laws of the state of West Virginia, plaintiff herein, be dismissed for the reason that said West Virginia corporation is unauthorized to do business in the state of Ohio, having failed to comply with Sections 178, 179 or 183 of the General Code of Ohio, or either of them.

(2) Defendants move that the bill herein on behalf of William R. Rose be dismissed for the reason that said bill shows on its face that said plaintiff Rose was on the twenty-fifth day of September, A. D. 1914, arrested in the county of Cuyahoga, Ohio, by a constable of the court of Henry M. Calvert, a justice of the peace in and for said county, upon an affidavit filed in said court and sworn to by one H. R. Young; that thereafter said Rose was taken before said Calvert as justice of the peace aforesaid; that said Rose waived a hearing before said

justice of the peace and was bound over to the grand jury of Cuyahoga county, which said grand jury returned an indictment against him under the law, which said Rose, as plaintiff, seeks to have this court declare unconstitutional.

Defendants further represent that at the September Term, 1915, of the Court of Common Pleas in and for Cuyahoga county, Ohio, to wit, on November 9, 1915, said William R. Rose was duly tried upon said indictment and by the jury in said court found guilty as charged in said indictment, and that the bill filed in this court is for the purpose of attempting to restrain the action of the Court of Common Pleas of Cuyahoga county, Ohio, which court did on or about the eighteenth day of December, 1914, obtain jurisdiction of said cause.

Respectfully submitted,

Harry T. Hall,
As Superintendent of Banks and Banking of the State of Ohio.

Cyrus Locher,
As Prosecuting Attorney of Cuyahoga County, Ohio.

William T. Smith,
As Sheriff of Cuyahoga County, Ohio.

By Edward C. Turner,
Attorney General of Ohio.

Henry S. Ballard,
First Assistant Attorney General of Ohio.
Solicitors for Defendants.

In the United States District Court for the Southern District of Ohio, Eastern Division.

Affidavit of William H. Guyton.—Filed December 27, 1915.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, **Plaintiffs,**

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Affidavit.

State of Ohio, Franklin County, ss.:

William H. Guyton being first duly sworn says upon oath that he is the duly appointed, qualified and acting assistant secretary of state of the state of Ohio.

Affiant further says upon oath that The Richard Auto Manufacturing Company, a corporation organized under the laws of the state of West Virginia, has not complied with the requirements of law authorizing said corporation to do business within the state of Ohio; that said corporation has not procured from the secretary of state of the state of Ohio a certificate that said corporation has complied with the requirements of law to authorize it to do business in the state of Ohio; nor has said corporation filed in the office of the secretary of state of the state of Ohio any of the information required by Sections 178, 179 and 183 of the General Code of Ohio, or either of them.

And further affiant saith not.

W. H. Guyton.

Sworn to before me and subscribed in my presence by the said William H. Guyton, this 27th day of December, A. D. 1915.

[Seal.] W. F. McNamara.

Notary Public in and for Franklin County, Ohio.

Transcript from Common Pleas Court of Cuyahoga County.—Filed December 28, 1915.

In the Court of Common Pleas.

The State of Ohio, Cuyahoga County, ss.:

State of Ohio	Crim. Doc. 13.
vs.	Violating "Blue Sky Law."
W. R. Rose.	No. 6287.

September Term, 1914.

November 12, 1914. Transcript and original papers from H. M. Calvert, J. P., Rockport township, filed. Bail.

December 18, 1914. To Court: This day came the grand jury and having found, now present to the court thru their foreman, a bill of indictment against the following named person, for the following crime and offense, indorsed by the foreman "A True Bill," and by him signed as foreman as follows, to wit:

No. 6287—The State of Ohio vs. W. R. Rose, indictment for unlawful attempt to sell stock. Jour. 23, p. 293.

December 21, 1914. To Court: Now comes the prosecuting attorney, on behalf of the state of Ohio, the defendant being in court in the custody of the sheriff, and arraigned at the bar of the court, and waiving the reading of the indictment, for plea thereto, the defendant says that he is not guilty and puts himself upon the country and the state doth the like, and the trial of this case is set for December 24, 1914. Now comes the

defendant and gives bond in the sum of $500, with F. M. Brady as surety. Jour. 23, p. 301.

June 7, 1915. To Court: Now comes the prosecuting attorney, on behalf of the state of Ohio and presents to the court the recognizance of said defendant, taken before the clerk of said court, on the 21st day of December, 1914, in the sum of $500.00, with F. M. Brady as surety. Thereupon, the said defendant, being three times solemnly called to appear and answer said charge, as he agreed to do, and failing so to do, and F. M. Brady, the surety, being three times solemnly called to produce the body of said defendant, as he agreed to do, and failing so to do, the court orders that the said recognizance be, and the same hereby is forfeited absolutely, and that a capias be issued for said defendant. Jour. 23, p. 745.

July 22, 1915. To Court: Bond herein is fixed in the sum of $500.00. Jour. 23, p. 853.

July 23, 1915. To Court: This day comes said defendant and gives recognizance in the sum of $500.00, with F. E. Dellenbaugh as surety. Jour. 23, p. 853.

November 9, 1915. To Court: Now came the prosecuting attorney, on behalf of the state of Ohio, and the defendant with his counsel; also came the following named persons as jurors, to wit: William Koehler, W. A. Bishop, G. H. Harper, John P. Reece, Thomas Shannon, Harry A. Markwardt, John A. Blass, Fred Gruman, Harry B. Knapp, George W. Creter, Carl R. Hartman and L. W. Twitchell, who were duly impaneled and sworn according to law. And the said jury having heard the testimony adduced by the parties, the arguments of counsel, and the charge of the court, retired to their room in charge of the bailiff for deliberation. And afterward came the jury, conducted into court by the bailiff, and returned the following verdict in writing, to wit: "We, the jury in this case, being duly impaneled and sworn, do find the defendant, W. R. Rose, guilty of unlawfully attempting to sell stocks as charged in the indictment." Jour. 24, p. 236.

November 11, 1915. Motion for a new trial filed.

The State of Ohio, Cuyahoga County, ss.:—Township of Rockport. Before H. M. Calvert, Justice of the Peace.

State of Ohio, vs. W. R. Rose, first name unknown.	Case No. 437. McGuith & McCuth, Defts. Atty.

Charge of Violating on Blue Sky Law.

September 14, 1914. This day came H. R. Young, who, being first duly sworn, made complaint, on oath and in writing as follows: W. R. Rose first name unknown being then and there a dealer in securities and stocks, in the county and state aforesaid, for the purpose of organizing and promoting a certain corporation, to wit, The Richards Auto Manufacturing Company, did within the said state, for and on behalf of the said The Richards Auto Manufacturing Company, said company being then and there issuer of said stock, offer to dispose of certain stock of the said The Richards Auto Manufacturing Company to one T. P. White (first name unknown), the said W. R. Rose (first name unknown), not being then and there licensed as provided by the laws of the state of Ohio, and without then and there having together with the filing fee of five dollars ($5.00) filed with the commissioners, to wit: the superintendent of banks, the application of the issuer of said stock for a certificate from said commissioner that the law has been complied with and that its business is properly and legitimately conducted, and that its proposed disposal of securities is not on unfair terms, and without having then and there filed a certified copy of the articles of incorporation of the said company, its regulations and by-laws, certified copies of all matters of the stockholders and directors relative to the issuance of such securities; sworn statement made by the president and secretary of the said company showing in detail the items of cash, property, services, patents, good-will, and any other consideration for which such stock or securities have been or are to be issued in payments; like certified copies of all contracts or agreements between the said company and any underwriter of such securities, and if disposed of by the said company all contracts or agreements relative to the sale and disposal thereof, all contracts made between any underwriter or any salesman, agents, or broker. The issuance of stock having then and there not been approved by the public service commission, or like body of any state in the United States, or any province of the Dominion of Canada, and that said stock having not then and

there disposed of by or on behalf of any underwriter who purchased said stock and paid therefor in cash or its equivalent before attempting to dispose of the same, at and less than ninety per cent (90%) of the price at which such securities were thereafter disposed of; said stock not being then and there that of a common carrier, and not being then and there engaged only in the business of manufacturing transportation, coal mining or quarrying; and said stock not being then and there the stock of a real estate or building company, the property of which is located in this state, regularly opened for public patronage as such member of a regularly organized or recognized stock exchange, contrary to the form of statute in such case as made and provided and against the peace and dignity of the state of Ohio. (Affiant) H. R. Young. Sworn to and subscribed before me, this 25th day of September, A. D. 1914. Henry M. Calvert, Justice of the Peace. Complaint filed. Warrant issued and delivered to R. Bingham, Spl., who made the following return: Pursuant to the command of this writ, I have arrested the within named W. R. Rose, and have him in court, this 12th day of November, A. D. 1914. R. Bingham, Spl., Constable.

October 1, 1914—10 a. m.
October 8, 1914—10 a. m.
October 10, 1914—10 a. m.
October 20, 1914—10 a. m.
October 30, 1914—10 a. m.
November 10, 1914—10 a. m.
November 11, 1914—10 a. m.
November 12, 1914—10 a. m.

11/12/14. Defendant in court and waives examination and is bound over to the Court of Common Pleas, in the sum of $1000 bail.

Justice's Fees.

		Plffs. Cost
Affidavits, taking and certifying each.......	$ .40	.40
Warrant persons, each....................	.40	.40
Subpoena, each	.05	.10
Continuance or adjournment, each.........	.20	1.60
Recognizance of bail, each................	.40	.80
Appointing special constable..............	.40	.40
Entering bond or undertaking, each........	.40	.40
Entering judgment	.40	.40
Filing necessary papers, each.............	.05	.35
Transcript, per 100 words.................	.15	.75
Total justice's fees......................		$5.60

Constable's Fees.

Warrant, person, each....................	$ .40	$ .40
Mileage, 1st mile, 30c; additional miles....	.05	.20
Subpoena, 1st name, 25c; additional names..	.10	.50
Mileage, 1st mile, 20c; additional miles.....	.05	.40
Copies, each	.25	.50
Mittimus, persons, each..................	.40	
Mittimus, persons, each	1.50	1.50
Total constable's fees..................		$3.50
Total costs, including witness fees shown on next page		$9.10

Plaintiff's Witnesses:
P. T. White.
Cleveland Trust Co.
Geo. P. Harding.
Cleveland Municipal Court, Baliff's Office.
H. R. Young, Marion Ohio.
(Said transcript endorsed.)
No. 6287.
Transcript from Criminal Docket Before H. M. Calvert, Justice of the Peace.
The State of Ohio vs. W. R. Rose.
Certificate.

The State of Ohio, Cuyahoga county, Rockport township, ss.:

I, the undersigned, a justice of the peace in and for said county and township, hereby certify that the within and preceding is a full and true transcript of the proceedings had by and before me in the above named case, on complaint No. 437 and of the costs therein, as recorded in my Docket C, page 594, Nov. 12, 1914.

H. M. Calvert, Justice of the Peace.

Indictment.

The State of Ohio, Cuyahoga County, ss.:

At a term of the Court of Common Pleas, begun and held at the court house in Cleveland, within and for said county of Cuyahoga, on the 1st day of September, in the year of our Lord one thousand nine hundred and fourteen, the jurors of the grand jury of the state of Ohio, and of the county of Cuyahoga, good and lawful men, then and there returned, tried, empaneled, sworn and charged to inquire within and for the body of the county of Cuyahoga, at the term aforesaid, upon their oath aforesaid, in the name and by the authority of the state of Ohio,

Do find and present, that W. R. Rose (first name unknown), late of the county aforesaid, on or about the

14th day of September, in the year of our Lord one thousand nine hundred and fourteen, with force and arms, at the county aforesaid, being then and there a dealer in securities and stocks, in the county and state aforesaid, for the purpose of organizing and promoting a certain corporation, to wit, The Richards Auto Manufacturing Company, did within the said state, for and on behalf of the said The Richard Auto Manufacturing Company, said company being then and there the issuer of said stock, attempt to dispose of certain securities, to wit: stock of the said The Richa.d Auto Manufacturing Company to one T. P. White (first name unknown), the said W. R. Rose not being then and there licensed as provided by the laws of the state of Ohio, and without then and there having, together with the filing fee for five dollars ($5.00) filed with the "commissioner," to wit: the superintendent of banks, the application of the issuer of said stock for a certificate from said "commissioner" that the law has been complied with, and that the said "commissioner" is satisfied that said company is solvent, and that its business is properly and legitimately conducted, and that its proposed disposal of securities is not on unfair terms, and without having then and there filed a certified copy of the articles of incorporation of the said company, its regulations and by-laws, certified copies of all minutes of the stockholders and directors, relative to the issuance of such securities; a sworn statement made by the president and secretary of the said company showing in detail the items of cash, property, services, patents, goodwill, and any other consideration for which such stock or securities have been or are to be issued in payment; like certified copies of all contracts or agreements between the said company and any underwriter of such securities and if disposed of by the said company all contracts or agreements relative to the sale and disposal thereof, all contracts made between any underwriter or any salesman, agent or broker; the said W. R. Rose not being then and there a licensee, or member of a regularly organized and licensed stock exchange, and not having an established and lawfully conducted place of business in this state, regularly opened for public patronage as such member of a regularly organized or recognized stock exchange, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

Cyrus Locher,
Prosecuting Attorney.

On the 21st day of December, 1914, I served a copy of the indictment in the above entitled case upon the defendant, W. R. Rose, by delivering to him said copy.

W. J. Smith, Sheriff.
By Will A. Weber, Deputy.

Sheriff's Fees.

Service of indictment	.50
Mileage	.08
	.58

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90

The State of Ohio, Cuyahoga County, ss.:

Be it remembered, that on the twelfth day of November, A. D. 1914, W. R. Rose and F. M. Brady, personally appeared before me, Henry M. Calvert, a justice of the peace in and for the township of Rockport, in the county aforesaid, and jointly and severally acknowledged themselves to owe the state of Ohio the sum of one thousand dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following to wit:

The condition of this recognizance is such, that if the above bound W. R. Rose shall personally be and appear before the Court of Common Pleas on the first day of the next term thereof, then and there to answer a charge of violating blue sky law, and abide the judgment of the court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

F. M. Brady,
W. R. Rose.

Taken and acknowledged before me on the day and year above written.

Henry M. Calvert, Justice of the Peace.

The State of Ohio, Cuyahoga County, ss.: Rockport Township. Before H. M. Calvert, justice of the peace in and for said township and county.

State of Ohio, Plaintiff,
against
W. R. Rose, Defendant.

Affidavit of Surety.

F. M. Brady offering himself as surety on the undertaking for W. R. Rose, in the above entitled action, being first duly sworn upon his oath says, that he is a resident of the city of Cleveland, in the county and state aforesaid, and that he is the bona fide owner of real property on record in said county. Located 4 acres - 79 and Har-

yard, value $6500.00. Mortgage clear in own name, said property is liable to execution, exceeding in actual value the sum of one thousand dollars beyond the amount of all his debts and liabilities, and over and above the amount allowed to heads of families, as being exempt from execution by the laws of the state of Ohio.

F. M. Brady.

Sworn to and subscribed before me this twenty-sixth day of September, A. D. 1914.

H. M. Calvert, J. P.

The State of Ohio, Cuyahoga County, ss.:

Affidavit.

Personally appeared before me, Henry M. Calvert, a justice of the peace in and for the township of Rockport, H. R. Young, who being by me first duly sworn deposes and says that on or about the fourteenth day of September, A. D. 1914, one W. R. Rose (first name unknown) being then and there a dealer in securities and stocks, in the county and state aforesaid, for the purpose of organizing and promoting a certain corporation, to wit, The Richard Auto Manufacturing Company, did within the said state, for and on behalf of the said The Richard Auto Manufacturing Company, said company being then and there the issuer of said stock, attempt to dispose of certain securities, to wit stock of the said The Richard Auto Manufacturing Company to one T. P. White (first name unknown); the said W. R. Rose (first name unknown) not being then and there licensed as provided by the laws of the state of Ohio, and without then and there having, together with the filing fee of five dollars ($5.00) filed with the "Commissioner," to wit: the superintendent of banks, the application of the issuer of said stock for a certificate from said commissioner that the law has been complied with, and that the said commissioner is satisfied that said company is solvent and that its business is properly and legitimately conducted, and that its proposed disposal of securities is not on unfair terms, and without having then and there filed a certified copy of the articles of incorporation of the said company, its regulations and by laws, certified copies of all minutes of the stockholders and directors relative to the issuance of such securities; a sworn statement made by the president and secretary of the said company showing in detail the items of cash, property, services, patents, good-will and any other consideration for which such stock or securities have been or are to be issued in payment; like certified copies of all contracts or agreements between the said company and any underwriter of such securities, and if disposed of by the said company

all contracts or agreements relative to the sale and disposal thereof, all contracts made between any underwriter or any salesman, agent or broker.

The issuance of stock having then and there not been approved by the public service commission, or like body of any state in the United States, or any province of the Dominion of Canada; and said stock having not then and there been disposed of by or on behalf of any underwriter who purchased said stock and paid therefor in cash or its equivalent before attempting to dispose of the same, at not less than ninety per cent (90%) of the price at which such securities were thereafter disposed of or to be disposed of; said stock not being then and there that of a common carrier, and not of a company organized under the laws of Ohio, and being then and there engaged only in the business of manufacturing, transportation, coal mining or quarrying; and said stock not being then and there the stock of a real estate or building company, the property of which is located in this state, the said W. R. Rose (first name unknown) not being then and there a licensee, or member of a regularly organized and licensed stock exchange and not having an established and lawfully conducted place of business in this state, regularly opened for public patronage as such member of a regularly organized or recognized stock exchange, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio..

H. R. Young.

State of Ohio, Cuyahoga County, ss.:

Sworn to and subscribed before me this twenty-fifth day of September, A. D. 1914.

Henry M. Calvert,
Justice of the Peace.

The State of Ohio, Cuyahoga County, ss.—September Term, A. D. 1915. To wit, November 9, 1915.

The State of Ohio, Plaintiff,
vs.
W. R. Rose, Defendant.
} Criminal Action.

Verdict.

We, the jury in this case being duly impaneled and sworn, do find the defendant, W. R. Rose, guilty of unlawfully attempting to sell stocks as charged in the indictment.

John A. Blass, Foreman.

State of Ohio, Cuyahoga County, ss.:—In the Court of Common Pleas.

The State of Ohio, Plaintiff,
vs.
W. R. Rose, Defendant.
Motion for New Trial.

Now comes the defendant and moves the court to grant a new trial herein, for the following reasons:

1st. That the verdict was contrary to the law.

2nd. That the verdict was contrary to the facts.

3rd. The verdict should have been for acquittal.

4th. No evidence was offered upon the part of the state until argument before jury. The letter presented in said case not having been read by the state to the jury until argument indicates.

5th. The court erred in overruling defendant's motion to direct the verdict.

B. J. Sawyer,
Attorney for Defendant.

[Duly certified.]

United States District Court, Southern District of Ohio, Eastern Division.

Entry.—Entered December 28, 1915.

This day this cause came on to be heard and was argued by counsel for the respective parties, whereupon said cause was taken under advisement by the court, and same is continued until the further order of the court in the premises.

Memorandum Opinion.—Filed February 10, 1916.

The Geiger-Jones Company, a Corporation Organized and Existing Under the Laws of the State of Ohio, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 51.]

Don C. Coultrap, Plaintiff,

vs.

Edward C. Turner, Attorney General of the State of Ohio, and Henry T. Hall, Superintendent of Banks and and Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Defendants.

[No. 52.]

William R. Rose and The RiChard Auto Manufacturing Company, a Corporation Organized Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

On Application for Temporary Injunction.

Before Warrington, Circuit Judge, and Sater and Hollister, District Judges.

Sater, District Judge:

The constitutionality of the so-called "blue sky" law of Ohio (Secs. 6373-1 to 6373-24, General Code, 103 Ohio L. pp. 743-753, 104 Ohio L. pp. 110-119, 105-106 Ohio L., pp. 363-364) is assailed in each of the above mentioned cases, which, for convenience, are considered together. Statutes of a kindred character have in learned opinions been declared invalid by federal courts sitting in Michigan (Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. Rep. 173, Halsey & Co. v. Merrick, not yet reported), Iowa (Compton v. Allen, 216 Fed. Rep. 537), West Virginia (Bracey v. Darst, 218 Fed. Rep. 482), and South Dakota (Sioux Falls Stockyards Co. v. Caldwell). The last named case, which is unreported, was decided by Sanborn, Circuit Judge, and Munger and Elliott, District Judges. Although a consideration of the act will involve a reiteration of principles already ably and convincingly stated, it is thought advisable to review it in part, at least,—a task rendered difficult on account of the

numerous exceptions to its general provisions, and, in some instances, of exceptions to such exceptions.

The Geiger-Jones Company, an Ohio corporation, is engaged in buying and selling in Ohio and other states, stocks and bonds principally of industrial corporations, domestic and foreign. It seems to prevent the revocation of the license heretofore granted it to transact such business and the threatened enforcement of the law against its continued prosecution of the same. Coultrap, a citizen of the state of Pennsylvania, and an agent of the Geiger-Jones Company, is the owner and holder of and a dealer in stocks of certain Ohio corporations and conducts his business in part by mail and in part by personal visits to the state. He charges that the revocation of the license of his employer will operate as a cancellation of his authority and that the contemplated enforcement of the statute will interrupt and destroy his business. Rose was heretofore arrested, indicted and convicted in one of the state courts for violating the act by selling the stocks and bonds of industrial concerns, and, particularly, the stock of his co-plaintiff, a West Virginia corporation, and is now awaiting sentence. Both he and The Richard Auto Manufacturing Company allege that the enforcement of the statute by the defendants named in their bill will prevent Rose from prosecuting his business of selling securities and his co-plaintiff from completing its organization and capitalization for the manufacture of automobiles. Briefly stated, the validity of the act is assailed on the grounds that (1) it is violative of the commerce clause of the federal constitution; (2) it is constitutionally obnoxious in that it denies plaintiffs of property without due process of law and the equal protection of the laws; (3) it delegates legislative and judicial power to an executive officer, in violation of the state constitution; and (4) it is a law of a general nature but does not operate uniformly throughout the state, as required by Section 26, Article 2, of the state constitution. If the act be unconstitutional, each of the plaintiffs is, as he must be, within the class whose constitutional rights are invaded. Standard Stock Food Co. v. Wright, 224 U. S. 540, 550. The prayer of each bill is for general as well as specific relief.

The act, which is entitled, "An act to regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales," prohibits, under severe penalties, the disposition of all securities subject to its provisions, without discrimination as to and regardless of their value, unless authority so to do is first obtained from the superintendent of banks

(termed the commissioner). The term "dispose of" is broadly construed to mean, "sell, barter, pledge, or assign for a valuable consideration or obtain subscriptions for." The first section, 6373-1, in comprehensive language declares that, except as otherwise provided in the act, no dealer may within the state dispose of or offer to dispose of any stocks, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all termed "securities") evidencing title to or interest in property issued or executed by any private or quasi-public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without being first licensed so to do. Promissory notes are not within the terms of the act, as was the case in the original Michigan statute. A limited number of other securities are also excluded from its provisions. The inclusive character of the act extends not only to "securities" coming within its provisions, but also to the persons subject to its exactions, prohibitions and penalties, as is evidenced by its definition of the terms "dealer" and "company," the former embracing "any person or company" and the latter "any corporation, copartnership or association, incorporated or unincorporated, whenever and wherever organized." The term "dealer" does not, however, include national banks or any company engaged in the marketing or flotation of its own securities or any stock-promoting scheme, although such company and scheme are required to obtain the certificate of the commissioner mentioned, and must abide by all the provisions contained, in Sections 6373-14 and 6373-16. A restricted number of other persons, natural and artificial, having occasion to dispose of securities, are also excluded from the classification of dealers. An "issuer" is defined to be an original issuer.

The act must be sustained unless it can be clearly shown to be in conflict with some constitutional provision. The question as to its wisdom was for the determination of the legislature; with that the court is not concerned. If the power under the federal constitution to enact it is absent, it is unimportant how wise, necessary or beneficent it may be, for it is then necessarily void because in conflict with the organic law of the land. Rail & River Coal Co. v. Yaple, 214 Fed. Rep. 273, 279, 280; Alabama & N. O. Transp. Co. v. Doyle, 176; Bracey v. Darst, 491, 492; Board of Health v. Greenville, 86 Ohio St., 1, 20; State v. Toledo, 48 Ohio St., 112, 132, 133.

If there are separate and independent unconstitutional provisions in the statute, which may be rejected,

and the rest of the act be permitted to stand and have effect according to the legislative intent, the valid portions must be upheld. But if an unconstitutional element pervades the entire statute as an inherent and essential part, it must fail as an entirety. In such a case it does not avail that the officer charged with the execution of the law may not enforce it according to its terms, but only as he may deem wise and expedient. Assent cannot be given, under such circumstances, to the proposition that although a statute may authorize the accomplishing of an unconstitutional purpose, it must, nevertheless, be presumed that it will, in fact, only be used to accomplish what can be done in accordance with the constitution. Taylor v. Com'rs., 23 Ohio St. 22, 33, 34; Alabama & N. O. Transp. Co. v. Doyle, 181; Bracey v. Darst, 491, 492; People v. Warden, 144 N. Y. 529, 539.

Because a certificate of stock is only evidence of the ownership of shares, the interest represented by them being held by the company for the benefit of the true owner (Citizens Sav. & Tr. Co. v. Ill. Cent. R. R., 205 U. S. 46, 57; Bank v. Mfg. Co., 67 Ohio St. 306, 314), it does not follow, as defendants' counsel contend, that such certificate is of less value than an unprinted sheet of paper of corresponding size and quality, and that it cannot therefore be a subject of interstate commerce. If it be but written evidence of an interest in corporate property, the same may be said of notes and bills, which are mere evidence of indebtedness on the part of individuals or corporations that issue them. In Merritt v. American Steel Bars Co., 79 Fed. Rep. 228, 235, C. C. A. 8, in speaking of stock certificates, it was said that:

> "In the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

In Ohio a stock certificate is so far property that it may be seized by an officer making an attachment or levy. Sec. 8673-13, G. C.

A state law which, in its essentials, is a legitimate exercise of the police power, is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected; but, if such law directly burdens such commerce, although expressed to be a regulation under the state police powers, it must be held to be unconstitutional, for the reason that the power to regulate commerce between the states is vested in Congress.

Arnold v. Yanders, 56 Ohio St. 417, 421; Re Oscar Julius, 4 Ohio C. C. (N. S.), 604, 609; Mugler v. Kansas, 123 U. S. 623, 661; Austin v. Tennessee, 179 U. S. 343, 344.

Utterances emanating from the Supreme Court and express rulings by lower federal courts establish beyond all reasonable controversy that stock and bonds, securities whose disposition is subject to the provisions of the act, are articles of legitimate interstate commerce. Bracey v. Darst, 495, 496; Compton v. Allen, 546. Sales of them as between the states and their transmission from one state to another, whether through the mails or the instrumentality of common carriers, constitute interstate commerce. Sales may be and are effected by telegraph, telephone, correspondence, traveling salesmen and the issuers or investment companies directly or through their local or branch houses. The securities may be delivered by such salesmen or branch houses at the times sales are made or subscriptions taken, or by the issuers or investment companies by means of any of the known and usual agencies for transmitting such instruments from one state to another.

Whether interstate transactions in the securities whose disposition is within the purview of the act directly burdens interstate commerce must be determined by testing its provisions by the federal constitution. The act (Sec. 6373-3) requires as a condition precedent to the authorization and right of an applicant to do business in the state that such applicant shall submit, with a filing fee of five dollars, to the commissioner, (a) the names and addresses of the applicant's directors and officers, if the applicant be a corporation or association, and of all partners, if it be a partnership, and of the individual, if it be such, and also the names and addresses of all agents of such applicant, assisting or about to assist in the disposition of securities; (b) the location of its principal office without and within the state, if it have both; and (c) the general plan and character of its business, and references as to its suitability to transact such business, which references the commissioner "shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant's directors, officers and agents." If the applicant be a foreign corporation, having its principal place of business beyond the boundaries of the state, it must also file a duly certified copy of its articles of incorporation, regulations and bylaws, and, if it be an unincorporated association, a certified copy of its articles of association or deed of settlement. Every applicant must also submit to the commissioner an irrevocable written consent to litigate in the

courts of Franklin county only any action brought against him on account of any fraudulent disposal of securities by him or his agents, and also to be bound by service of process made personally or by registered mail. Notice of all applications for registration as a licensed dealer in securities must be published at the expense of the applicant in a daily newspaper of general circulation, and a further payment of an annual fee of fifty dollars is exacted should a license be issued. An amended license is necessary whenever the name of an agent is added to or stricken from the original, a payment of five dollars being exacted in the first instance and of two dollars in the latter. Notice of each amendment to the license must be published at the licensee's expense. The commissioner may at any time revoke any license or refuse to renew the same upon ascertaining—the manner of which is not stated—that the licensee is of bad business repute, has violated any provision of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions. He is required to give at least five days' notice of his intention to revoke or to refuse to renew or grant a license, but the licensee or applicant, as the case may be, is not accorded a hearing. Following the refusal or revocation of a license, the applicant or licensee, as the case may be, may contest in the Franklin county court the correctness of the commissioner's ruling, but must assume the burden of disproving the grounds assigned as the basis of his official action, and must also meet any additional reasons which the commissioner may plead in justification.

Notwithstanding the granting of a license to an applicant, it may not dispose of any given securities until it has also filed, unless excused by the commissioner from so doing, a further statement (Sec. 6373-9) touching the issuer of such securities, if the issuer be a company, setting forth (a) its name and the location of its principal office and the names of its officers and directors, or, if it be a co-partnership, the names of the partners; (b) a general detailed showing of its assets, liabilities, and capital stock, as of a date not later than the close of the last fiscal year, and also of its gross income, expenses and fixed charges for the year last prior thereto, or for such other time as the issuer has been in business, if that time be longer than a year; (c) a pertinent description of such securities and the purpose of their issue; and (d) the approximate price at which the licensee proposes to dispose of them. The exemptions from the filing of the information called for by such section which the statute

permits the commissioner to grant are enumerated in Sec. 6373-10. In most instance they are so qualified as to relieve but a limited number of licensees and introduce a fatal inequality as regards the protection of the laws guaranteed by the fourteenth amendment.

The statute further provides that no issuer or underwriter, nor any person or company acting in behalf of either (Sec. 6373-14), shall, within the state, for the purpose of organizing or promoting any company or of assisting in the flotation of its securities, dispose or attempt to dispose of any such securities until the commissioner has issued a certificate permitting such to be done, the granting of which must be subsequent to the issuer or underwriter filing an application (except in certain instances which need not now be noted), with a fee of five dollars, containing the information required by paragraphs (a), (b), (c) and (d) of Sec. 6373-9, a certified copy of the issuer's articles of incorporation or association, regulations and by-laws, of all minutes of stockholders and directors relative to the issuance of such securities, of any contracts which have been made between the issuer and its underwriter of such securities (copies of all such subsequent contracts also to be filed when made), and of all contracts between any underwriter and any sales agent or broker, and also a sworn statement made by the president and secretary of the issuer showing in detail the items of cash, property, services, patents, good will, and any other consideration for which such securities have been or are to be issued in payment. The commissioner (Sec. 6373-16) may, as he deems advisable, examine the issuer of such last named securities at any time, both before and after his grant of the certificate named in Sec. 6373-14. In the exercise of his discretion, he may require all or any part of the expense of such examination to be borne by the applicant, who is compelled to deposit with him in advance for such purpose whatever sum he may order. The applicant receives an itemized statement of expenditures made, but this follows the conclusion of the examination. If the commissioner finds that the applicant has complied with the law, is not fraudulently conducting its business, is not proposing to dispose of its securities on grossly unfair terms and is solvent, a certificate authorizing the disposal of such securities shall issue, providing, except in case of a licensed dealer, a fee of ten dollars be paid, but, if the commissioner does not affirmatively so find, the certificate must be refused. It must be issued or denied within a reasonable time after application for it is made, which time shall be within thirty days after the

applicant or certificate holder, whose certificate has been revoked, has fully complied with all the requirements of the act, but as the commissioner is the sole judge of what constitutes compliance, and as the examination, especially of large concerns, would in some instances be prolonged and at times have to be conducted at distant points in this or another country, the issuing of a certificate may be delayed indefinitely and beyond the thirty day period. After the applicant is authorized to proceed with its proposed business, the commissioner may still revoke its certificate and deny it the privilege of continuing to dispose of the securities in question, if he has reason to believe that the certificate holder's business is fraudulently conducted, or that the securities are disposed of upon grossly unfair terms, or that the issuer is insolvent, the right to review his action being again restricted to the Franklin county court. Whether such "reason to believe" shall be the result of an orderly examination of the issuer's conduct and affairs, or be otherwise acquired, does not appear.

Violation of the act constitutes a misdemeanor or felony, regard being had to the character of the offense, and is visited by a fine or imprisonment, or both.

In International Text Book Co. v. Pigg, 217 U. S. 91, and Buck Stove Co. v. Vickers, 226 U. S. 205, 213-216, a Kansas statute, akin to the Ohio act, but less drastic, was held to impose a direct burden on legitimate interstate commerce and to be violative of the commerce clause of the federal constitution not only on account of the license required as a condition precedent to the right to transact a lawful business, but because it is not competent for a state legislature to prescribe, as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock, authorized and paid up, and its par and market value, as to its assets, liabilities, officers, trustees, directors, manager, and stockholders, with a showing of the stockholdings of each of the latter and the amount paid on his holdings, and the post-office address of all of such above named persons. A quite similar but (as regards the parties at whom it was aimed) a more comprehensive statute in that it ran not only against express or transportation companies incorporated by any foreign government, but, like the present act, also against any association or partnership acting under the laws of any foreign government, was likewise denounced in Crutcher v. Kentucky, 141 U. S. 47, in a well reasoned opinion which is freely quoted in the Pigg case. The draughtsman of the act here in question, un-

wittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above named cases, and added others equally, if not more, obnoxious. The burdens which it imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable. The enforced suspension from all business activity for a period of thirty days, imposed by the original Michigan act, was held to be a fatal "30-day paralysis." In the later decision rendered by the same court (Halsey & Co. v. Merrick) the subsequent act of that state was overthrown, notwithstanding the absence of such restrictive provision. In the present act the prohibition from the transaction of business must extend for a week, and possibly twenty or thirty days, or more; it therefore offends against the constitution quite as much as the first of the Michigan acts.

The act must be further tested by its effect upon the citizen's right to pursue a lawful calling. The natural right to life, liberty and the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the public welfare, health or prosperity. But, however viewed, the act transcends the legitimate exercise of the police power and violates the due process clause of the constitution. There is a fundamental distinction between what Mr. Justice Bradley termed, in Butchers Union Co. v. Crescent City Co., 111 U. S. 746, 763, the ordinary occupations and pursuits of life, forming the large mass of industrial avocations which are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand, and the kinds of business and transactions which are affected by a public interest or arise from public grant or exist by public sufferance. Of this latter class are the liquor traffic, grain elevators, innkeepers, warehouses, itinerant peddlers, insurance, motion picture shows, concerns exercising public franchises, and the like, all of which it is competent for the state law-making power to regulate and within proper bounds subject to executive license and control, as the interests of society may require. To the former class, with which alone we are now dealing, belongs the right in good faith to buy and sell securities and to fix their price by agreement, either in individual transactions or in the course of repeated and successive transactions of a similar char-

acter, a right which, when so exercised, is both property and liberty and which cannot be made subject to either executive grant or denial. City of Cleveland v. Construction Co., 67 Ohio St. 197, 219. In Allgeyer v. Louisiana, 165 U. S. 578, 589, it was said that the liberty mentioned in the fourteenth amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." If an issuer or owner of or dealer in securities issued in good faith and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal or of offering them for disposal, he is deprived not only of his property, within the meaning of the constitution, by taking from him one of the incidents of ownership (City of Chicago v. Netcher, 183 Ill., 104, 110), but also of his liberty, as appears from Mr. Justice Matthews' saying in Yickwo v. Hopkins, 118 U. S. 356, 370, that:

> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Legitimate commercial transactions, such as the disposal of securities of the kind above mentioned, cannot be regulated by legislative enactment. The act in question seeks to regulate private transactions, but the person, natural or artificial, that sells securities based upon reasonable value, is entitled to the protection of the same safeguards as the man who sells clothing, dry goods, groceries, or hardware, or engages in any other private business that is not affected by a public interest. As was fittingly said in the Doyle case (p. 179):

> "The issuing of * * * stocks or bonds by a private company to get money for its own business, no one can suppose is a public or quasi-public enterprise; the business of buying and selling stocks and bonds or other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to jus-

tify its entire prohibition save under drastic restraints.''

Every proposed offering of securities must first be submitted to the commissioner subject to the delay incident to his investigation or examination, which, should he temporarily grant a license or a certificate, may thereafter be continued and repeated, and, in case of an issuer mentioned in Sec. 6373-16, at its expense, limited only by his unrestrained discretion. Every investigation and examination authorized is **ex parte**. The applicant, whether a dealer or issuer, is not permitted to be heard as to the granting or revocation of a license or the award of a certificate, on the important questions of his own good repute, his alleged or surmised violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms under which his disposals are made, or his own solvency. No rules of procedure are prescribed in accordance with which the investigation or examination shall be made, nor is the commissioner required to establish any rule or regulation as to what shall constitute good repute, solvency, or fraudulent conduct. He may at will deal with each case as it arises and vary his course to suit his pleasure. He is at liberty to hear, if he chooses, only evidence unfavorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even the whim and caprice (if he gives them play) of the commissioner or of his assistant (subject to the commissioner's supervision) may not only halt, but injure and perhaps destroy a worthy business enterprise and cast a cloud on the name of the applicant or licensee, and when such applicant or licensee seeks redress in the courts he must assume the burden of disproving the findings made against him, however groundless they may be. Even an effort is in effect made to deny him access to the federal courts. Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. Rep., 1, C. C. A. 8. In given respects the above named law is more severe than that of any of the states whose ''blue sky'' laws have been held unconstitutional. They afforded some opportunity, at least, to the applicant to be heard when his right to do business was under investigation, and, when his business and good name were assailed, opened to him the doors of all the courts of the state for redress against adverse rulings and limited the burden of cost to which he might be subjected in consequence of an examination into his affairs.

A police regulation, like any other law, is subject to the equal protection clause of the fourteenth amendment. Atchison & Santa Fe Ry. Co. v. Vosburg, 238 U. S. 56,

59. A statute does not deny the equal protection of the law if all persons brought under its influence are treated alike under the same conditions (Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 209) and if it does not subject the individual to an arbitrary exercise of the powers of government (Duncan v. Missouri, 152 U. S. 377, 382). The following illustrates wherein the act fails to meet the test thus prescribed: If more than fifty per cent. of the bonds of a given issue by a corporation are included in a sale to one purchaser, such issue is not embraced within the act (Sec. 6373-2) (1). The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the onerous provisions of the law, although its securities may be of the highest financial character. An owner who is not the issuer of the securities he holds is at liberty to dispose of his holdings for his own account regardless of the statute, providing he can do so without resorting to repeated and successive transactions of a similar character; but, if such transactions are expedient or necessary, he may not sell, unless, at inconvenience and financial cost and through delay and the commissioner's approving stamp of "good repute in business," he obtains a dealer's license so to do. A natural person who has not underwritten and is a **bona fide** owner of his securities, whether he be of good repute or not in business, may dispose of them for his own account, but the underwriter, although he may possess the same moral qualities and wealth as the natural person, or outrank him in both of these respects, may not dispose of his holdings, except by compliance with the none too clear provisions of the act. Although a natural person may dispose of his holdings as above indicated, a partnership or association may not do so. The exemptions based on market reports of a daily newspaper of general circulation (Sec. 6373-10) (b) and (e), would fail to embrace large numbers of meritorious issuers of the different classes of securities, for it is well known that many securities are not listed on the market or mentioned in any standard manual of information. Sec. 6373-10 (c) can have no application to an issuer, if some disposee is found who in a single transaction acquires securities of a given issue to the amount of five thousand dollars or more. There are many worthy concerns, each capitalized for a considerable sum, in which no one's investment reaches that amount. There would moreover seem to be no reason why, if some one person

who, risking that sum, should be defrauded, others should be cheated of smaller sums by sales of stock without the supervision which the law is intended to provide. A licensee may be relieved from giving information concerning the issuer of securities (Sec. 6373-10) (f), if the disposal of such securities is at a commission of less than one per cent. of their par value through a licensed member of a regularly organized and recognized stock exchange, having an established and lawfully conducted place of business in the state regularly open for public patronage, of all of which the commissioner is the sole judge. He may not be thus relieved, if the disposal is made by any one else.

The above observations upon the act have been made with full appreciation of Sec. 2, Art. XIII, of the Ohio constitution as amended September 3, 1912, the pertinent portion of which provides:

> "Corporations may be classified and there may be conferred upon proper boards, commissioners or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law."

It is to be regretted that the Supreme Court of Ohio has not been called upon either to construe this provision or to pass upon the statute now under consideration nor have we had the benefit of the discussion of this constitutional provision by counsel. We are, however, impressed with the belief that the provision cannot be so construed as to change the conclusions we have reached concerning the operation and effect of the statute. The effect of the constitutional provision, in our judgment, is simply to give distinct expression to powers which were plainly implied under the same section and article of the constitution of 1851, which provided that:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

It is settled by Berea College v. Kentucky, 211 U. S. 45, 57, that:

> "A power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a character granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.

Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass., 446, 451; Holyoke Co. v. Lyman, 15 Wall. 500, 522; Close v. Glenwood Cemetery, 107 U. S. 466, 476."

It was there further held that while the language of a statute may not in terms amend a charter, yet, where such appears to have been the legislative intent, the statute will be regarded as an amendment, Mr. Justice Brewer saying (p. 57):

"It would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated."

It is also settled that where such power to alter or repeal a charter is reserved, it is competent for the legislature to repeal the charter as well as to amend it. Greenwood v. Freight Co., 105 U. S. 13; Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 258, 269, 270, 271; Shields v. State, 26 Ohio St. 86, 93, 94, aff'd. 95 U. S. 316, 324; State v. City of Hamilton, 47 Ohio St. 52, 73, 74. The most, then, that can be said of the statute in question is that its provisions operate to amend the articles of incorporation, the charters, of all domestic corporations that are in terms affected by the provisions of the act. It inevitably follows that these reserved powers include the power to supervise and regulate corporations. The consideration then of the present statute cannot be aided upon any theory that Sec. 2, Art. XIII, as amended, vests in the state legislature any greater power than it possessed under the old section and article; for manifestly there can be no difference between an express power and an implied power to do the same thing. It results that the constitutional validity of the present statute is to be tested by considerations practically the same as it would have been prior to the amendment in question. For example, a state is without power either through constitutional or statutory provision to avoid the effect and force of the commerce clause of the Federal Constitution; it hardly need be said that the statutory provisions before pointed out which directly impose burdens upon interstate commerce are of necessity violative of that clause; and, apart from everything else, it cannot be presumed that the legislature would have enacted the statute if it had understood that the provisions aimed against foreign corporations could not be sustained, since this alone would work an obvious discrimination against domestic corporations. Again, the power to supervise and regulate the business here involved was never before and cannot now be understood

to signify authority so to burden the business of domestic corporations as in practical effect to destroy it, regardless of its actual character and merit. We are not to be understood by anything said in this opinion to intimate that it is not within the power of the state legislature reasonably to regulate the business of corporations of its own creation or that of foreign corporations and joint stock companies which are operating within the borders of the state (Alabama & N. O. Transp. Co. v. Doyle, 186-187; Bracey v. Darst, 494, 495), such power of regulation being more extensive as to such artificial entities than as to individuals, copartnerships and voluntary associations. We do mean, however, to say, as we have already in effect stated, that the things attempted to be done by the present statute cannot be sanctioned under the guise of "supervisory and regulatory" measures in respect of the business of issuing and selling stocks and securities, whether of domestic or foreign corporations.

Other features of the act and other points argued have been considered; the treatment of the one and the discussion of the other would prolong this lengthy opinion and are not necessary.

The licenses mentioned in the first two of the above entitled causes expired on December 31, 1915. No occasion, therefore, exists, for enjoining their cancellation. The bill in each of them is drawn on narrow lines. The prayer of each, however, taken in conjunction with certain averments, is such as to warrant the temporary enjoining of the defendants therein named against enforcing or attempting to enforce the statute in question. In the third of the above cases, the motion filed by the defendants to dismiss is overruled. A temporary injunction is awarded in each case.

Interlocutory Injunction.—Filed February 28, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Interlocutory Injunction.

This day the above entitled cause came on for hearing before the Honorable John W. Warrington, United States circuit judge, the Honorable John E. Sater, United States district judge, and the Honorable Howard C. Hollister, United States district judge, upon the motion of the above-named defendants to dismiss the bill of complaint, and was argued by counsel and submitted to the court for determination. After consideration of said motion the court finds that said motion is not well taken and doth overrule the same, to the overruling of said motion, and each branch thereof, defendants then and there excepted and still except.

Thereupon this cause came on for further hearing before said judges upon the application of the above-named complainants for an interlocutory injunction in accordance with the prayer of their complaint, and was argued by counsel and was submitted to the court for determination. After consideration of the things alleged in the complaint and the arguments of counsel, in the opinion of the court, all of the three judges above named concurring, the act entitled

> "An act to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio, and to prevent fraud in such sale,"

contained in Volume 103 of the Ohio Laws at pages 743-753, and the acts amendatory thereof, being the acts set forth in the bill of complaint filed herein, are violative of the Constitution of the United States, particularly of the interstate commerce clause and the clause prohibiting the deprivation of liberty and the taking of property without due process of law, and securing the equal protection of the law.

It is hereby ordered that the said defendants, Harry

T. Hall, superintendent of banks and banking of the state of Ohio; Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and William T. Smith, sheriff of Cuyahoga county, Ohio, and all their employes and subordinates, and each of them individually, be and they are hereby enjoined from attempting to enforce and from enforcing the provisions of said act and the acts amendatory thereof of the Ohio legislature, and from interfering in any way with the business of the plaintiffs, and from exercising further activities against the plaintiffs or either of them in relation to the conduct of their business, and from in any wise doing anything by virtue of or under favor of said acts prejudicial to the said plaintiffs or either of them, except such proceedings as may be deemd proper in any criminal action pending against said complainants or either of them when the complaint in this cause was filed.

This injunction shall continue until the final decision of this case or the further order of the court.

To all the rulings and orders of said court the defendants, and each of them, except.

Leave is given defendants to answer within five days.

Petition for Appeal.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Petition for Allowance of Appeal to the Supreme Court.

The above-named defendants, Harry T. Hall, superintendent of banks and banking of the state of Ohio, Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and William T. Smith, sheriff of Cuyahoga county, Ohio, conceiving themselves aggrieved by the decree made and entered on the twenty-eighth day of February, 1916, in the above entitled action, do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal

may be allowed and that a transcript of the record of proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

This fourth day of March, 1916.

Harry T. Hall,
Superintendent of Banks, Etc.
Cyrus Locher,
Prosecuting Attorney of Cuyahoga Co., Ohio.
Wm. T. Smith,
Sheriff of Cuyahoga County, Ohio.
Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Clarence D. Laylin,
Solicitors for Defendants.

The foregoing appeal is allowed. Dated March 4, 1916.

J. E. Sater,
United States District Judge.

Assignment of Errors.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Assignment of Errors.

The defendants, Harry T. Hall, superintendent of banks and banking of Ohio, Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and William T. Smith, sheriff of Cuyahoga county, Ohio, respectfully specify as their reasons for appealing from the decree entered upon the twenty-eighth day of February, 1916, on the bill of complaint of plaintiff for an interlocutory injunction the following assignment of errors:

First: That the court erred in overruling the motion to dismiss the bill of complaint filed by defendants herein.

Second: That the court erred in sustaining the motion of complainants for an interlocutory injunction and in granting the interlocutory injunction against said defendants, Harry T. Hall, superintendent of banks and banking of the state of Ohio, Cyrus Locher, prosecuting attorney of Cuyahoga county, and William T. Smith, sheriff of Cuyahoga county, Ohio, their employes and subordinates, and each of them individually, from enforcing or attempting to enforce the provisions of Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, contained in Volume 103 of the Laws of Ohio, pages 743-753, and the acts amendatory thereof.

Third: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, uncontitutional, null and void as being in violation of Section 8 of Article I of the Constitution of the United States.

Fourth: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void as being in violation of Section 1 of Article XIV of the Constitution of the United States.

The defendants therefore pray that the judgment heretofore rendered be reversed; that the interlocutory injunction therein allowed be dissolved and that the defendants be restored to all things they have lost by reason thereof.

Harry T. Hall,
Superintendent of Banks of Ohio.
Cyrus Locher,
Prosecuting Attorney of Cuyahoga County, Ohio.
William T. Smith,
Sheriff of Cuyahoga County, Ohio.
By Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Clarence D. Laylin,
Solicitors for Defendants.

Order Allowing Appeal.—Filed March 4, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio, Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

Order Allowing Appeal.

Upon motion of Edward C. Turner, attorney general of Ohio, solicitor for the defendant, it is ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered in this cause on the twenty-eighth day of February, 1916, be and the same is hereby allowed and it is ordered that a certified transcript of the record herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

J. E. Sater,

Judge, United States District Court, Southern District of Ohio, Eastern Division.

Appeal Bond.—Filed March 17, 1916.

Know all men by these presents, That we, Harry T. Hall, superintendent of banks of the state of Ohio, Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and William T. Smith, as sheriff of Cuyahoga county, Ohio, as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the state of New York, as sureties, are held and firmly bound unto William R. Rose and the RiChard Auto Manufacturing Company, a corporation organized and existing under the laws of the state of West Virginia, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said William R. Rose and the RiChard Auto Manufacturing Company, their certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated the sev-

enth day of March, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a session of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said court between the said William R. Rose and the said the RiChard Auto Manufacturing Company, plaintiff, and the said Harry T. Hall, superintendent of banks of the state of Ohio, the said Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and the said William T. Smith, sheriff of Cuyahoga county, Ohio, defendants, an order or decree was rendered against the said Harry T. Hall, superintendent of banks of the state of Ohio, the said Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and the said William T. Smith, sheriff of Cuyahoga county, Ohio, defendants.

Harry T. Hall, superintendent of banks of the state of Ohio, and the said the said Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and the said William T. Smith, sheriff of Cuyahoga county, Ohio, defendants, having obtained an order of appeal and filed a copy thereof in the clerk's office of the said court to reverse the order or decree in the aforesaid suit, and a citation directed to the said William R. Rose and the said the RiChard Auto Manufacturing Company, plaintiff, citing and admonishing them to be and appear at a session of the United States Supreme Court.

Now, the condition of the above obligation is such, That if the said Harry T. Hall, superintendent of banks of the state o[illegible]io, the said Cyrus Locher, prosecuting attorney of C[illegible]oga county, Ohio, and the said William T. Smith, s[illegible] Cuyahoga county, Ohio, shall prosecute their [illegible]ffect, and answer all damages and cost if t[illegible]ake their plea good, then the above obliga[illegible]d; else to remain in full force and virtue.

[illegible]arry T. Hall,
Superintendent of Banks of State of Ohio.
Cyrus Locher,
County Prosecuting Attorney of Cuyahoga Co., Ohio.
Wm. T. Smith, [Seal.]
Sheriff of Cuyahoga County, Ohio.
American Surety Company of New York [Seal.]
By Thos. J. Davis,
Resident Vice-President.

Attest: L. H. McGowan,
Resident Assistant Secretary.

Sealed and delivered in presence of—
G. A. Howells,
Helen B. Dorsey.
Approved by—
J. E. Sater,
District Judge.

Citation.—Filed March 21, 1916.

United States of America, Sixth Judicial Circuit, ss.:

To William R. Rose, and The Richard Auto Manufacturing Company—Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein Harry T. Hall, superintendent of banks and banking of the state of Ohio, Cyrus Locher, prosecuting attorney of Cuyahoga county, Ohio, and William T. Smith, sheriff of Cuyahoga county, Ohio, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, chief justice of the United States, this seventeenth day of March, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and fortieth.

J. E. Sater,
U. S. District Judge, Southern District of Ohio.

State of Ohio, County of Franklin, ss.:

On this twenty-first day of March, A. D. 1916, personally appeared before me, a notary public in and for said county, Henry S. Ballard, and made oath that he delivered a copy of within citation to John A. Shauck, solicitor for appellees.

Henry S. Ballard.

Sworn to and subscribed before me this twenty-first day of March, 1916.

[Seal.] W. F. McNamara,
Notary Public in and for Franklin County, Ohio.

Service of copy of within citation acknowledged this twenty-first day of March, 1916.

John A. Shauck,
Solicitor for Apellees.

Precipe.—Filed March 21, 1916.

In the District Court of the United States for the Southern District of Ohio, Eastern Division.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, **Plaintiffs,**

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, **Defendants.**

]No. 53.[

Precipe.

To the Clerk: Please prepare transcript for appealing to the Supreme Court of the United States, under Section 266 of the Judicial Code, from the order made in the above entitled cause February 28, 1916, by Judge Warrington, Hollister and Sater, granting an interlocutory injunction, including the following:

Copy of the following pleadings and documents:

(a) Bill of complaint.
(b) Entry granting restraining order.
(c) Notice.
(d) Motion to dismiss filed by defendants.
(e) Affidavit of William H. Guyton.
(f) Transcript from Common Pleas Court of Cuyahoga county in case of State of Ohio vs. William R. Rose.
(g) Entry submitting case.
(h) Memorandum opinion filed by Judges Warrington, Hollister and Sater on February 10, 1916, granting interlocutory injunction.
(i) Order granting interlocutory injunction, entered February 28, 1916.
(j) Petition for appeal.
(k) Assignment of errors.
(l) Order allowing appeal.
(l) Appeal bond.
(m) Appeal bond.
(n) Citation with acknowledgment of service thereon.

Edward C. Turner,
Attorney General of Ohio.
Henry S. Ballard,
First Assistant Attorney General.
Attorneys for Defendants.

CLERK'S CERTIFICATE.

William R. Rose, and The RiChard Auto Manufacturing Company, a Corporation Organized and Existing Under the Laws of the State of West Virginia, Plaintiffs,

vs.

Harry T. Hall, Superintendent of Banks and Banking of the State of Ohio; Cyrus Locher, Prosecuting Attorney of Cuyahoga County, Ohio, and William T. Smith, Sheriff of Cuyahoga County, Ohio, Defendants.

[No. 53.]

The United States of America, Southern District of Ohio, Eastern Division, ss.:

I, ..., clerk of the District Court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this...............day of..............., 1916.

(Seal.)

____

Clerk.

By______________________

Deputy.

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IN THE

Supreme Court of the United States

October Term 1916.

No. 438.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO,

Appellant,

vs.

THE GEIGER-JONES COMPANY.

No. 439.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO,

Appellant,

vs.

DON C. COULTRAP.

No. 440.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO; CYRUS LOCHER, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO, AND WILLIAM T. SMITH, SHERIFF OF CUYAHOGA COUNTY, OHIO,

Appellants,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO MANUFACTURING COMPANY.

Appeals from the District Court of the United States for the Southern District of Ohio.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASES.

In the instant cases will be observed a striking illustration of what Mr. Justice McKenna referred to when he said in the course of the opinion of this court in **German Alliance Insurance Co. vs. Lewis, 233 U. S. 389-409:**

> "Against that conservatism of mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

The above entitled causes are appeals under Section 266 of the Judicial Code from orders of the District Court of the United States for the Southern District of Ohio, Eastern Division, allowing interlocutory injunctions against appellants suspending and restraining the enforcement, operation and execution of certain statutes of the state of Ohio, to wit, Sections 6373-1 to 6373-24, both inclusive, of the General Code of Ohio, said sections having been duly enacted by the legislature of Ohio at its regular session in the year of 1913 as an act entitled "To regulate the sale of bonds, stocks and other securities and real estate not located in Ohio and to prevent fraud in such sale," which said act is contained in volume 103 of the Laws of Ohio, pages 743 to 753, as amended 104 Ohio Laws, pages 110 to 119, inclusive,

and as amended 106 Ohio Laws, pages 363 and 364, inclusive.

Said interlocutory injunctions each restrain the action of Harry T. Hall, the duly appointed, qualified and acting superintendent of banks of Ohio, in the enforcement and execution of said statutes and said acts.

Said interlocutory injunction in Cause No. 440 also restrains the action of Cyrus Locher, the duly elected, qualified and acting prosecuting attorney of Cuyahoga county, Ohio, and of William T. Smith, the duly elected, qualified and acting sheriff of said Cuyahoga county, in the enforcement and execution of said statutes and said acts.

Said statutes and acts of Ohio seek to protect the citizens of Ohio from fraud in the sale in Ohio of certain kinds of stocks, bonds, and other securities not listed on some regular stock exchange, or whose values may not be ascertained from the market reports of a daily newspaper published in the state of Ohio or in some standard manual of information, as well as to protect the citizens of the state of Ohio against fraud in the sale in Ohio by other than the owner, **bona fide**, of real estate not located in Ohio.

Said court has declared said statutes and acts and all parts thereof null and void, not only as to citizens and corporations of other states attempting to transact such business in Ohio, but as to citizens and corporations of Ohio as well.

Said legislation was passed in pursuance of an amendment to the Constitution of Ohio, which constitutional amendment was adopted by the people of Ohio in September, 1912, and became effective on January 1, 1913.

More than twenty other states of the United States have passed similar legislation involving identical principles of law and constitutional interpretation.

While the cases were separately brought and argued the court below considered the cases together and rendered but one opinion. For the convenience of this court and with its permission the cases will be argued and submitted together, attention being called briefly in this statement to the facts in each case, taking them in the order in which they were filed in the court below.

1. Cause No. 438, Hall, etc., vs. The Geiger-Jones Company.

The Geiger-Jones Company, a corporation created under the laws of the state of Ohio with its principal place of business at Canton in said state of Ohio, engaged in the business of selling stocks of various industrial corporations, brought an action to restrain the cancellation by the superintendent of banks of Ohio of its license under the so-called Ohio Blue Sky Law (General Code of Ohio, Sections 6373-1 to 6373-24, both inclusive).

In other words, claiming that the law under which it had applied for and been granted a license was unconstitutional and void, The Geiger-Jones Company asked the court below to restrain the cancellation of that license for violations of the provisions of that law.

Pending a decision upon the application for an interlocutory injunction the license in controversy expired by lapse of the time for which it had been granted. The court's attention was called to this fact. In the con-

cluding paragraph of the opinion of the court below (Record cause No. 438, page 45) the court said:

> "The licenses mentioned in the first two of the above entitled causes expired on December 31, 1915. No occasion therefore exists for enjoining their cancellation. The bill in each of them is drawn on narrow lines. The prayer of each, however, taken in conjunction with certain averments, is such as to warrant the temporary enjoining of the defendants therein named against enforcing or attempting to enforce the statute in question."

The Geiger-Jones Company also sought to restrain the Attorney General of Ohio from giving advice to the Superintendent of Banks of Ohio concerning the duties of said superintendent with respect to said license held by said company. They sought further to prevent the making public by the Attorney General of Ohio of the reasons for any recommendations or advice to the Superintendent of Banks of Ohio. Much of the plaintiff's bill consists of allegations relating solely to said Attorney General. No interlocutory injunction was awarded against the Attorney General. The court, however, did allow an interlocutory injunction against the Superintendent of Banks and all his employes and subordinates on the ground that said Blue Sky Law was violative of the Constitution of the United States, particularly the interstate commerce clause and the clause prohibiting the deprivation of liberty and the taking of property without due process of law and securing the equal protection of the law.

2. **Cause No. 439, Hall, etc., vs. Coultrap.**

According to his bill Coultrap is an agent of The Geiger-Jones Company, above referred to. He claimed to live in Pennsylvania although his employer had taken out the agent's license referred to in said Coultrap's bill upon the representation that said Coultrap was a resident of Ohio (Record cause No. 439, page 22). Coultrap's bill follows closely that of his employer, setting up that under the so-called Blue Sky Law of Ohio his employer, The Geiger-Jones Company, had been granted a "dealer's license" and that under the same law he (Coultrap) had been granted an agent's license and that the Superintendent of Banks of Ohio as "commissioner" under the Blue Sky Law was about to cancel the license of his employer for violation of said Blue Sky Law to the irreparable injury of said Coultrap. The bill sought to prevent the cancellation of his employer's "dealer's license." Both the dealer's license and the agent's license referred to in Coultrap's bill expired pending the decision of the court below.

The court allowed an interlocutory injunction against the superintendent of banks of Ohio, his employes and subordinates.

3. **Cause No. 440, Hall, etc. et al., v. Rose, et al.**

The third case to be filed was that of William R. Rose, who claimed to be a citizen of the state of Ohio and who had been arrested, indicted and convicted (but not sentenced pending the decision on a motion for a new trial) for violating the Blue Sky Law of Ohio. Rose in his

bill claimed to be acting as agent for The RiChard Auto Manufacturing Company in the flotation of the capital stock of said company. The RiChard Auto Manufacturing Company also joined as plaintiff in this cause. The bill shows on its face that The RiChard Auto Manufacturing Company is a corporation organized under the laws of the state of **West Virginia with its principal office and place of doing business in the City of Cleveland, State of Ohio.**

Their bill alleges that The RiChard Auto Manufacturing Company has a contract with a man who is going to turn over to it certain patents, patterns, etc., and that all it needs is money, which the Ohio Blue Sky Law prevented it from obtaining because it would not permit said Rose to sell the capital stock of said The RiChard Auto Manufacturing Company.

Plaintiffs asked for an injunction against Harry T. Hall as superintendent of banks of Ohio, Cyrus Locher as prosecuting attorney of Cuyahoga county, and William T. Smith as sheriff of Cuyahoga county, "inhibiting and restraining said defendants and each of them from the further prosecution of said criminal proceedings and from in any wise interfering with either of said plaintiffs in the prosecution and financing of said The RiChard Auto Manufacturing Company" etc.

To the joint bill of plaintiffs defendants filed a motion to dismiss (Record Cause No. 440, page 23) on two separate grounds; one as to The RiChard Auto Manufacturing Company, and the other as to Rose. The ground on which a dismissal as to The RiChard Auto Manufacturing Company was sought was that said company was a foreign corporation unauthorized to do business in the

state of Ohio, having failed to comply with Sections 178, 179 and 183 of the General Code of Ohio, or either of them. This branch of the motion was supported by the affidavit of the assistant secretary of state (Record Cause No. 440, page 24).

A dismissal as to Rose was sought for the reason that the bill showed upon its face that the Ohio courts had obtained jurisdiction of the case approximately a year before the instant case had been instituted and that the purpose of the bill in the instant case was to restrain the action of the Court of Common Pleas of Cuyahoga county, Ohio. In support of this branch of the motion there was filed a transcript from the Court of Common Pleas of Cuyahoga county, Ohio, showing the conviction of said Rose and the pendency of a motion for a new trial (Record Cause No. 440, page 25).

The motion to dismiss was overruled as to both branches and an interlocutory injunction was allowed against Hall as superintendent of banks, Locher as prosecuting attorney of Cuyahoga county, and Smith as sheriff of Cuyahoga county, together with all their employes and subordinates.

HISTORY.

The evils resulting from the unbridled sale of alleged securities had become so inimical to the welfare of the citizens of various states that about one-half of the states of the Union have enacted so-called blue sky legislation.

In the **report of the postmaster general** (chief inspector) for 1913, it is said at page 97 of said report:

> **"The stock selling proposition appears to appeal to the public more than any other one fraud scheme**

conducted and the amount of money taken in by promoters operating this class of scheme is enormous.''

(Blackface ours.)

In the **report of the postmaster general** for 1914 (report of solicitor) page 90, it is said:

> "The conditions of business in this country have been revolutionized in the past few years. The old common law rule of **caveat emptor** cannot apply to mail order sales. At the present time sales are being made at a great distance from the purchaser, who must pay out his money upon the faith of representations found in advertisements, catalogues and other literature, with no opportunity to examine the articles before purchase."

As was said by the Supreme Court of North Carolina in the case of **State v. Agey,** decided May 3, 1916, reported in **88 S. E. Rep. 727,** advance sheet No. 9, in which the blue sky law of that state was upheld:

> "The intent of the statute is to protect our people, under the police power, from fraud and imposition by irresponsible, non-resident parties. These instances have been so frequent that the United States Post Office Department has estimated that the people of this country have been losing annually more than one hundred millions of dollars by speculative schemes which have no more substantial basis than so many feet of 'blue sky.'
>
> To prevent such an imposition on its people is an essential duty of government. If there is fraud and imposition in a case of this kind the parties imposed on can rarely go to Georgia to hunt up the guilty party, even if to be found there, and undergo the expense incident thereto. Even if this could be done, there would rarely be any assets which could be applied to the demands of the plaintiff. This state has sought to protect its people, not by forbidding such transactions, but by the very reasonable requirement that when parties, whether incorporated

or not, acting under the authority, actual or merely asserted, of another state, propose to do business in our borders, they must submit their statement of assets and the nature of their business to the insurance commissioner of this state who will issue his license to do business here when he 'is satisfied that the company or corporation is safe and solvent and has complied with the laws of this state applicable to fidelity companies and governing their admission and supervision by the insurance department' and making it indictable to transact such business in this state until such license has been obtained. This is a reasonable requirement under the police power of this state."

And as said by the court in the case of **Standard Home Co. v. Davis, 217 Fed. Rep. 904-919,** in upholding the blue sky law of Arkansas:

"**Experience** has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies by extravagant expenditures for salaries, agents' commissions, and other apparently legitimate purposes, through officers who had practically nothing invested in the association, and whose character and reputation stamped them as adventurers and cheats. Such regulations are proper and wholesome. The dockets of the national courts have been crowded for the last few years with criminal prosecutions of persons charged with use of mails of the United States in carrying out fraudulent schemes by so-called investment companies and persons offering allurements to get rich quick. But those courts are only clothed with jurisdiction to prosecute those who, in carrying out their fraudulent schemes, make use of the mails, and only after the commission of the offense. This necessarily affects only a small portion of those engaged in such schemes, and can in no wise act as a preventative. **The state alone can provide for the prevention and punishment of all who commit frauds, although the mails are not used for their accomplishment, and enact laws to prevent the com-**

mission of these crimes. Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer." (Blackface ours.)

Indeed, some of the federal district courts which have declared the various blue sky acts unconstitutional have stated that they took judicial notice of the fact that such a law was needed. After the first blue sky laws (Michigan and Iowa) were held invalid the National Association of Attorneys General, at their annual meeting in Washington, D. C., in October, 1914, appointed a committee to draft and submit a new proposed blue sky law (a pattern of which was held invalid in the latest Michigan and South Dakota cases). In their report under date of December 28, 1914, the **attorneys general of Michigan, Iowa and Arkansas,** all of whom had been engaged in cases challenging the constitutionality of such legislation stated:

> "The committee has therefore framed a bill with the sole object of preventing fraud in the sale of stocks, bonds and other securities, by requiring inspection and a sufficient amount of supervision to accomplish this end. We believe it to be a cardinal principle of constitutional law that the federal constitution does not grant to any one the right to commit fraud upon the citizens of another state even though engaged in interstate commerce."

In the 1912 Ohio Constitutional Convention a number of proposals seeking to remedy the existing evil in the sale of stocks, etc., were introduced and two of them passed by the convention (Nos. 72 and 174). The committee on phraseology combined these two proposals and as proposal No. 33 to amend Section 2 of Article XIII of

the constitution they were submitted to the voters. The following argument accompanied **proposal No. 33**:

> "This amendment is offered for the purpose of authorizing legislation that will permit the classification of corporations and the regulation by law of the issue and sale of stocks and bonds, as well as the supervision over their organization and business. The further purpose is to authorize such legislation as will prevent the sale of fraudulent stocks and bonds by either domestic or foreign corporations. The amendment further recognizes the right of the law-making power to regulate the sale of other forms of personal property."

As amended September 3, 1912, and effective January 1, 1913, **Section 2 of Article XIII of the Constitution of Ohio** provides as follows:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual."

Pursuant to this constitutional amendment the general assembly at its first session thereafter enacted Ohio's first blue sky law (103 O. L. 743). In January, 1914, the United States District Court declared the Michigan act invalid. Immediately thereafter the governor of Ohio sent a special message to the general assembly and the Ohio law was redrafted and re-enacted (104 O. L. 110).

One section (6373-16) was amended by the last session of the general assembly (106 O. L. 363).

The entire law together with an analysis of it and a review of the decision of the Federal District Courts upon other blue sky laws immediately follows.

OHIO BLUE SKY LAW.

An Act

To regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales. (103 O. L. 743) as amended by

An Act

To amend Sections 6373-1, 6373-2, 6373-3, 6373-4, 6373-5, 6373-6, 6373-7, 6373-8, 6373-9 6373-10, 6373-11, 6373-12, 6373-13, 6373-14 6373-15 6373-16 and 6373-24 of the General Code of Ohio to further regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sales. (104 O. L. 110) as amended (as to Section 6373-16 only) 106 O. L. 363.

Section 6371-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed "securities") evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit,) or by any taxing sub-division of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided. Who must licensed.

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Section 6373-2. The term "securities," as used in this act, shall not be deemed to include conveyances of real estate; or, where the same have not been judicially declared invalid, and where at the time of such sale there is no default in payment of any part of the interest or principal of the same;

1. Mortgage bonds and notes (other than corporate bonds where more than fifty per cent of the entire issue is not included in a sale to one purchaser) secured by a bona fide mortgage on real estate;

2. Securities of quasi-public corporations, the issuance of which has been authorized by the public service commission of this state;

3. The stock or obligation of any national bank, or of any bank, trust company or building and loan association, organized under the laws of this state and subject to examination and supervision by the proper authorities thereof.

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fined.

The term "dealer," as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters, or any stock promotion scheme whatsoever, except:

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lers.

a. An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is the bona fide owner of the security, and disposes of his own property for his own account;

b. One, who in a trust capacity created by any law of the United States or of this or any other state or by judicial authority, lawfully disposes of any property embraced within such trust;

c. A bank or trust company, organized under the laws of this state and subject to examination and supervision by the proper authority thereof, selling a security for a licensee, other than the issuer or underwriter thereof, at a commission of not more than two per cent, where such bank or trust company is not a regular dealer in securities;

d. One, not the issuer, who disposes of securities to a licensee under this act or to a company which, as a part of its regular business, deals in or holds such securities;

e. A pledgee selling, in the ordinary course of business, a security pledged to him as security for debt in good faith and not for the purpose of avoiding the provisions of this act;

f. The issuer, organized under the laws of this state, where the disposal, in good faith and not for the purpose of avoiding the provisions of this act, is made for the sole account of the issuer, without any commission and at a total expense of not more than two percentum of the proceeds realized therefrom plus five hundred dollars and where no part of the issue to be disposed of is issued, directly or indirectly, in payment for patents, services, good will, or for property not located in this state; provided that the president and secretary, or the incorporators if done before organization, of the issuer shall, prior to such disposal, file with the "commissioner" a written statement setting forth the existence of all such

facts and that such issuer is formed for the purpose of doing business within this state.

As used in this act, the term "company" shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; "dispose of" shall be construed to mean "sell, barter, pledge or assign for a valuable consideration or obtain subscriptions for"; "issuer," the original issuer of the security; and, where the context demands it, words in the present tense include the future tense; in the masculine gender include the feminine and neuter gender; in the singular number include the plural, and in the plural, the singular number; the word "whoever" includes all persons, natural and artificial principles, agents and employees; "and" may be read "or" and "or" "and."

$5 filing fee to accompany application.

Section 6373-3. Before such license shall be issued to any dealer, there shall be filed by him with the superintendent of banks, herein termed the "commissioner," together with a filing fee of five dollars, an application for such license, together with information, in such form as shall be determined by such "commissioner" setting forth:

Names and addresses.

a. The names and addresses of the directors and officers if such applicant be a corporation or association, and of all partners if it be a partnership, and of the person if the applicant be an individual, together with the names and addresses of all agents of such applicant assisting in the disposal of such securities;

Location.

b. Location of the applicant's principal office and of his principal office in the state, if any;

c. The general plan and character of the business of said applicant, together with references, which the "commissioner" shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners and agents;

Business to be conducted under this li[illegible]

If the applicant be a corporation organized under the laws of any other state, territory or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation, certified by the proper officer of such state, territory or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement.

Foreign corporations to furnish copy of articles.

The applicant at the same time shall also file with said "commissioner" a duly executed written instrument, irrevocable, consenting that any action brought against such applicant, arising out of and founded upon the fraudulent disposal of such securities by him or his agents, may be brought in Franklin county, and that, in the event that proper service of process cannot be had upon such applicant in such county, service of process made therein by the sheriff of such county, by sending a copy thereof by registered mail, at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application or such other place as the applicant may thereafter designate in writing filed with the "commissioner," shall have the same effect as if personally made upon the applicant, according to the laws of this state.

pplicant must iblish notice application.

Section 6373-4. Notice of all applications for registration as a licensed dealer in such securities shall be published in a daily newspaper of general circulation in the city where the applicant's principal place of business in the state is located, or in the city of Columbus, if the applicant has no such place of business in the state, and no such application shall be acted on by the "commissioner" until the expiration of one week from the date of such publication, but shall be acted upon within twenty days after proof of such application has been filed with him. If the "commissioner" be satisfied of the good repute in business of such applicant and named agents, he shall, upon the payment of an annual fee of fifty dollars, and an additional fee of five dollars for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon payment of such annual fee, unless revoked as herein provided. The expense of all publications provided for in this act shall be paid by the applicant for license. Pending a final disposition of such application the "commissioner" may grant temporary permission to such applicant to transact business as a dealer under this act. All such renewals shall be made as of the first day of January in each calendar year upon proper application therefor, filed not less twenty nor more than sixty days next preceding such date.

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Section 6373-5. Such license shall be taken out at the beginning of each calendar year, but it may be issued at any time for the remainder of such year, and in such case the annual fee shall be reduced four dollars for each

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expired month but in no case shall it be less than ten dollars. Upon the payment of a fee of five dollars for each specified agent not named in such license the same may at any time be amended or supplemented to include such agent. Upon the written request of such applicant, accompanied by a fee of two dollars, such license shall be revoked as to any agent or agents of such applicant, and an amended license shall thereupon be issued for such applicant and his remaining agents; and thereafter the applicant shall not be bound by the acts of the agent whose license has been revoked. Notice of such amendment shall also be published as aforesaid.

Minimum fee $10.

Additional agents.

Revocation of agency.

Section 6373-6. Such "commissioner" may at any time revoke any such license, or refuse to renew the same, upon ascertaining that the licensee:

License to be revoked when.

a. Is of bad business repute;

b. Has violated any provision of this act; or

c. Has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions.

No dealer whose license has been revoked shall be relicensed within six months from the date of such revocation.

The "commissioner" shall at once lay before the prosecuting attorney of the proper county any evidence which shall come to his knowledge of criminality under this act.

Section 6373-7. At least five days before revoking or refusing to grant or renew, a license, the "commissioner" shall send by registered mail to the licensee, at the address named in the application written notice of his intention so to do, specifying therein the reasons for such revocation or refusal.

Notice of revocation.

Petition for reversal of commissioner's ruling.

Section 6373-8. Any one whose license shall be refused or revoked, or to whom a renewal of license may be denied, may file, within thirty days thereafter, in the Court of Common Pleas of Franklin county, a petition against the "commissioner," officially, as defendant, alleging therein, in brief detail, the plaintiff's qualifications to be licensed and praying for a reversal of the official action complained of. Upon service of summons upon said defendant, returnable within three days from its date, but otherwise made as in civil actions, he shall, within one week from such return day, file an answer, in which he shall allege by way of defense the grounds previously assigned in his notice to such applicant or licensee, and such other grounds as shall, in the meantime, accrue or be discovered. All allegations of the answer shall be deemed to stand denied without further pleading and, upon application of either party, the cause shall be advanced and heard without delay. Merely technical irregularities in the procedure of such "commissioner" shall be disregarded and the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of.

Court's decision final.

The court's decision shall consult only the rights of the plaintiff and the protection of the public and the "commissioner" shall prosecute no proceedings to obtain a reversal, modification or vacation of a judgment rendered in favor of the plaintiff and in such event, shall forthwith issue the license applied for. A judgment sustaining the refusal of the "commissioner" to grant or renew a license shall not bar, after thirty days, a new application by plaintiff for a license, nor shall a judgment in favor of the plaintiff prevent such "commis-

sioner" from thereafter revoking such license for any proper cause which may thereafter accrue or be discovered.

Section 6373-9. Before such licensee shall dispose of any of such securities, within this state, he shall file with such "commissioner," in such form as shall be determined by him, the following information concerning such securities: If issued by any company, Must file statement of condition of issuer.

(a) The name, location of principal office of the issuer and the names of its officers and directors, or if a copartnership, the partners;

(b) A statement of the issuer, showing, in general detail, the assets and liabilities, and capital stock of the issuer, as of a date as late as the close of its last fiscal year, and of its gross income, expenses and fixed charges, for one year last prior thereto, or for such time as the issuer has been in business, if less than one year;

(c) A pertinent description of such securities, and the purpose of said issue, and

(d) Unless the foregoing information be excused under the provisions of the following section, the approximate price at which the licensee purposes to dispose of such securities.

If the securities be of a taxing subdivision of any other state, territory, province or foreign government, and are not an obligation of the entire taxing subdivision and payable out of the proceeds of a general tax, there shall be filed the information required by paragraphs (c) and (d) of this section and, in addition thereto, a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the same is secured and that, to the best of his knowledge, there

is no default in the payment of any part of the interest or principal of such securities and are no adjudications adversely affecting, or pending suits questioning the validity of the same.

tatement condition issuer need ot be filed hen.

Section 6373 10. The information required in the preceding section need not be filed:

(a) Unless required by the "commissioner," if the same has been filed by any other licensee; or

(b) If actual current sales of the securities, at prices quoted, shall have been, from time to time, for not less than six months next preceding such disposal, published in the regular market reports of the news columns of a daily newspaper of general circulation in this state; or

(c) Where there is a disposal of securities, the price paid or consideration rendered for which, in a single transaction, by one disposee, shall amount to five thousand dollars or more; or

(d) Where the securities disposed of are those of manufacturing or transportation companies, or of common carriers or other public utilities, issued and outstanding in the hands of bona fide purchasers for value, prior to March 1st, 1914, where such companies were, on said date, and shall be, at the time of sale, actual going concerns, either directly or through lessees, and where there shall be at the time of sale no default in payment of any part of the interest or principal of such securities; or

(e) Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by such "commissioner"; or

(f) Where the disposal is made for a commission of less than one percentum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted place of business in this state, regularly open for public patronage as such.

Section 6373-11. Every dealer, before or at the time of circulating the same, shall furnish to the "commissioner" one copy of such prospectus, circular or other document of like nature and of each advertisement, circulated by him in connection with the sale of any securities concerning which information is required to be filed under the provisions of Sections 6373-9 and 6373-10 of the General Code. **Circulars, etc. to be filed.**

Section 6373-12. No person or company shall, for the purpose of organizing or promoting any insurance company, or of assisting in the flotation of its stock after organization, dispose or offer to dispose, within this state, of any such stock, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language: **Insurance companies.**

"No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of.........per cent of the amount actually paid upon separate subscriptions, or, in lieu thereof there may be inserted, '$........per share from every fully paid subscription,' and the remainder of such payment shall be invested as authorized by the law governing such company and held by the organizers (or trustees as the case may be) and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the

business of such company after having been licensed and authorized therefor by proper authority."

ense not exceed 15%. The amount of such commission, promotion and organization expenses shall in no case exceed fifteen per cent of the amount actually received upon the subscription.

Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid.

lity of one counsels dvises the hase with- disclosing cy. Section 6373-13. Whoever, with intent to secure financial gain to himself, advises and procures any person to purchase any security and receive for such advice or services any commission or reward from the owner or salesman thereof, without disclosing to the purchaser the fact of his agency or his interest in such sale shall be liable to such purchaser for the amount of his damage thereby, upon tender of such security to, and suit brought against, such adviser, within one year subsequent to such purchase.

ment of mation e filed suer. Section 6373-14. For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in Section 6373-16 of the General Code which shall not be done until, together dollar fee. with a filing fee of five dollars, there be filed with the

commissioner the application of such issuer or underwriter for the certificate provided for in Section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of Section 6373-9 of the General Code, the following:

(a) A certified copy of the articles of incorporation or association of the issuer, its regulations and by-laws;

(b) Certified copies of all minutes of stockholders and directors relative to the issue of such securities;

(c) A sworn statement made by the president and secretary of the issuer, showing in detail the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment;

(d) Like certified copies of all contracts or agreements between the issuer and any underwriters of such securities, and, if disposed of by the issuer, all contracts and agreements relative to the sale and disposition thereof; any any such contracts or agreements made subsequent thereto shall be filed immediately upon the execution thereof;

(e) All contracts made between such underwriter and any salesman, agent or broker.

Does not apply to certain issuers.

This section shall not apply where the issuance of the securities has been approved by the public service commission or like body of any state of the United States or any province of the Dominion of Canada, or where the sale is made by or on behalf of an underwriter who, in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him and pays therefor, in cash or its equivalent, before attempting to sell the same, not less than ninety

per centum of the price at which such securities are thereafter sold by him; nor where the securities are those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal-mining or quarrying, and the whole or a part of the property upon which such securities are predicated is located within this state; nor of a real estate or building company all of whose property, upon which such securities are predicated, is located in this state; nor in the case of an issuer excepted under paragraph (f) of Section 6373-2, General Code; nor in cases where the filing of information is dispensed with under the provisions of paragraphs (b), (d), (e) or (f) of Section 6373-10, General Code.

The information required by paragraphs (d) and (e) of this section shall be for the information of the commissioner only, and shall not be disclosed by him except when lawfully required in a judicial proceeding.

Licensed dealer only may deal in foreign real estate.

Section 6373-15. No person or company, unless licensed in the manner and under the conditions applicable thereto hereinbefore provided for dealers, shall, within this state deal in real estate not located in Ohio of which he is not the actual and bona fide owner and unless the "commissioner" shall issue his certificate as provided in the following section, and prior to such issuance there shall, together with a filing fee of five dollars, be filed with the "commissioner" an application for such certificate, and a written statement of the applicant containing a pertinent description of the real estate the sale of all or a part of which is sought to be made, and the nature and source of the title of the owner thereto,

Filing fee $5.

and the amount or value and the nature of the consideration paid or allowed by him therefor, it shall, within this state, be unlawful:

(a) For any corporation, association or co-partnership doing business under any name other than the name or names of such person or of all the members of such association or co-partnership to sell any real estate not located in Ohio.

(b) For any person or company engaged in the business of dealing in real estate to sell or offer for sale any such real estate, the title to which is or is represented to the purchaser to be in the name of a corporation or unincorporated company, or of a person doing business under a fictitious name.

Exceptions.

This section shall apply where the title to such property is held in the name of a trustee for any corporation or for any such described person or company; but it shall not be deemed to prohibit the disposal by an owner of his own property, in good faith and not for the purpose of avoiding the provisions of this act, where the transaction is not one of repeated transactions of a similar nature, performed as a part of the business of dealing in real estate; nor shall it be deemed to prohibit a railroad company having an immigration bureau or department from advertising either directly or through its accredited representatives, the fact that there are along its route lands for colonization or sale; provided that such advertising be not of specific tracts of real estate, and not for the purpose of avoiding the provisions of this act.

Immigration bureau exempt.

Examination of issuer or owner.

Section 6373-16. Said commissioner shall have power to make such examination of the issuer of the securities,

or of the property named in the two next preceding sections, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable. When in the discretion of the commissioner all or any part of the expense of such examination should be paid by the applicant for such certificate, such applicant shall deposit with the commissioner such sum of money as the commissioner may order, out of which said sum the commissioner shall pay that portion of the expense of such examination as the commissioner determines said applicant should pay. The commissioner shall render to the applicant an itemized statement of the expenditure and a proper record thereof shall be kept. And if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and that the issuer or vendor is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. But if it shall not affirmatively so appear he shall so notify the applicant, in writing, and of his refusal to issue such certificate. Such certificate shall be issued or refused within a reasonable time after the filing of the application therefor, which shall be within not more than 30 days from and after the applicant or certificate holder whose certificate has been revoked has fully complied with all requirements of this act precedent thereto; provided that the commissioner may at any time revoke any such certificate issued by him when he has reason to believe that the business of the holder thereof is being fraudulently conducted, or

that such securities or other property are being disposed of upon grossly unfair terms, or, in the case of securities that the issuer thereof is insolvent. Such applicant shall have the same right of review of such finding as is given to a dealer by Section 6373-8. The fee provided for in this section shall not be required of an applicant who is licensed as a dealer.

Section 6373-17. Such certificate shall recite in bold type that the "commissioner" in no wise recommends such securities or other property; and no person or company shall advertise, in connection with the sale of such securities, the fact that such certificate has been issued unless such advertisement also contains in bold type a copy of such recital. **Commissioner in no wise recommends securities certificated.**

Section 6373-18. In addition to the liability now imposed by law, any person or company that, by written or printed circular, prospectus, statement or advertisement of any kind, shall offer for subscription or purchase any security, or receive the profits accruing from the disposal of securities so advertised, shall be liable to any person who, on the faith of such advertisement or document, acquires such security, for the loss or damage sustained by him by reason of any untrue statement contained therein, unless such person or company shall establish that he or it had no knowledge or notice of the publication of such advertisement prior to the transaction complained of, or had just and reasonable grounds to believe the statements thereof to be true. Wherever any corporation shall be so liable, the directors thereof shall also be, under like limitations, jointly and severally liable. Any such director, upon the payment of a judgment so obtained against him, shall be subrogated to **Additional liability.**

the rights of the plaintiff against such corporation and shall have the right of contribution for the payment of such judgment, under like limitations, against any of his fellow directors. Lack of reasonable diligence to ascertain the fact of such publication or the falsity of any statement therein contained, shall be deemed to be knowledge of such publication and of the falsity of any untrue statement thereof. Any action brought against such director, based upon the liability hereby imposed, shall be brought within two years after the acquisition of the security by any person so damaged or after payment of the judgment for which contribution is sought.

issuer an insurance mpany, must ply to insurce department for cericate in tion 16.

Section 6373-19. If the issuer of such securities be a company incorporated, organized or formed to make any insurance named in Subdivisions I and II, Division III, Title IX of the General Code, the "commissioner," for all the purposes named in Sections 14 and 16 of this act, shall be the superintendent of insurance of this state. In addition to the powers given to, and the duties prescribed to be performed by, such "commissioner," under said sections, the superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state.

Penalty for false statement, etc.

Section 6373-20. Whoever knowingly makes any false statement of fact in any statement or matter of information required by this act to be filed with the "commissioner," or in any advertisement, prospectus, letter, circular or other document, containing an offer to dispose or solicitation to purchase, or commendatory matter con-

cerning such securities or real estate, with intent to aid in the disposal of the same, or whoever knowingly violates any of the provisions of Sections 12, 14 or 15 of this act, or for the purpose of aiding in the disposal of any security or real estate, knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, shall be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned in the penitentiary not more than one year or both; and whoever violates any of the other provisions of this act shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned in the county jail or workhouse not more than sixty days, or both.

Accused presumed to have knowledge.

Section 6373-21. In any prosecution brought under this act the accused shall be deemed to have had knowledge of any matter of fact where, in the exercise of reasonable diligence, he should ,prior to the commission of the offense complained of, have secured such knowledge. Information and indictments under this act need not negative any of the exceptions enumerated in sections two, ten and fourteen hereof.

Act does not limit other liability.

Section 6373-22. Nothing herein contained shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of this act, for the violation of any other statute or of any other provision hereof.

Section 6373-23. Nothing herein contained shall be so construed as to impair the obligation of prior contracts.

Section 6373-24. The superintendent of banks, as "commissioner" under this act, is hereby authorized to

appoint an assistant commissioner and such clerks as are actually necessary to carry out the provisions of this act and to fix their salaries; such appointments and salaries to be subject to the approval of the governor. Subject to the supervision of such "commissioner," the assistant commissioner may perform all the duties imposed upon, and have all the powers granted to, such "commissioner" under the provisions of this act. All fees received hereunder by the "commissioner" shall be deposited by him with the treasurer of state upon the warrant of the auditor of state.

Fees paid into state treasury.

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License to Dealer.

Certificate of Securities and Property.

General.

ANALYSIS OF THE LAW.

Foreword.

At the outset it should be pointed out that the Ohio Blue Sky Law (General Code of Ohio, Sections 6373-1 to 6373-24, both inclusive) regulates **only sales within the state of Ohio by persons within the state.**

The Ohio Blue Sky Law in no wise interferes with interstate commerce. **The law simply attempts to regulate sales within the state of Ohio by persons within the state.**

Section 1 of the law, being **Section 6373-1 of the General Code of Ohio,** provides:

> "Except as otherwise provided in this act, no **dealer** shall, **within this state**, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments. * * * ".

This provision of the law clearly indicates that the license is required only of "dealers" and that that "dealer" must at the time he is engaged in the sale be "within this state" in order to be subject to the license or the law.

Again, in the following section, **Subdivision 3, the statute** defines the term "dealer" as follows:

> "The term 'dealer' as used in this act, shall be deemed to include **any** person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except: * * *"

It will be observed that any person outside of the state may sell to any person within the state, or any person within the state may buy of any person outside of the state or may sell to any person outside of the state any stock of domestic or foreign corporations free from the statute. From the whole statute it is quite evident that the license is upon the "business of dealing" in stocks, bonds and securities and not upon any single isolated transaction. **The shipment is not taxed or regulated.**

The Ohio "Blue Sky Law" does not in any manner include within its regulations any of the following, which are not considered securities for any purpose under the provisions of the act:

(a) Commercial paper, negotiable or non-negotiable, including bills, notes and checks.

(b) Conveyances of real estate.

(Where the same have not been judicially declared invalid and at the time of such sale there is no default in

payment of any part of the interest or principal, the following:)

(c) Mortgage bonds and notes (other than corporate bonds where more than fifty per centum of the entire issue is not included in the sale to one purchaser) secured by a bona fide mortgage on real estate. ,

(d) Securities of quasi-public corporations, the issuance of which has been authorized by the public service commission of the state.

(e) The stock or obligation of any national bank or of any bank or trust company or building and loan association organized under the laws of this state and subject to examination and supervision by the proper authorities thereof.

Object of Ohio Blue Sky Law.

For the purpose of preventing fraud in the sale of securities by "dealers" **within the state,** the state of Ohio does three things:

(1) Licenses the business of dealing in securities.

(2) As to certain securities requires certain information to be filed by a dealer.

(3) In the case of a limited class of securities requires the issuer to furnish certain information and obtain a certificate.

When License Not Required

1. A license is not required:

(a) By an owner not the issuer or underwriter who disposes of his own property for his own account.

(b) A national bank.

(c) One, who in a trust capacity created by any laws of the United States or of this or any other state or by judicial authority, lawfully disposes of any property embraced within such trust.

(d) A bank or trust company, organized under the law of this state and subject to examination and supervision by proper authorities thereof, selling a security for a licensee, other than the issuer or underwriter thereof, at a commission of not more than two per centum, where such bank or trust company is not a regular dealer in securities.

(e) One not the issuer who disposes of securities to a licensee under the act, or to a company which, as part of its regular business, deals in or holds such securities.

(f) A pledgee selling in the ordinary course of business a security pledged to him as security for debt in good faith and not for the purpose of avoiding the provisions of the act.

(g) The issuer, organized under the laws of this state, where the disposal in good faith and not for the purpose of avoiding the provisions of the act is made for the sole account of the issuer without any commission and at a total expense of not more than two per centum of the proceeds realized therefrom plus $500.00, and where no part of the issue to be disposed of is used directly or indirectly in payment for patents, services, good will or for property not located in this state.

When Information Is Required.

2. Where the securities offered are not sold by a member of a stock exchange at a commission of less than one per centum, or are such that their value may not be as-

certained from the market reports of a daily newspaper in the state or in some standard manual of information, or do not belong to other excepted classes hereinafter enumerated, the dealer is required to furnish the following information:

(a) The name, location of the principal office of the issuer and names of its officers and directors, or if a copartnership the partners;

(b) A statement of the issuer, showing in general detail the assets and liabilities and capital stock of the issuer, as of a date as late as the close of its last fiscal year, and of its gross income, expenses and fixed charges, for one year last prior thereto, or for such a time as the issuer has been in business, if less than one year.

(c) A pertinent description of such securities, and the purpose of said issue, and

(d) Unless the foregoing information be excused under the provisions of the following section (6373-10), the approximate price at which licensee proposes to dispose of such securities.

If the securities be of a taxing subdivision of any other state, territory, province or foreign government, and are not an obligation of the entire taxing subdivision and payable out of the proceeds of a general tax, there shall be filed the information required by paragraphs (c) and (d) above and, in addition thereto, a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the same is secured and that, to the best of his knowledge, there is no default in the payment of any part of the interest or principal of such securities and no adjudication adversely affecting, or pending suits questioning the validity of the same.

When Information Not Required.

None of the above information need be filed in the following instances:

(a) Unless required by the commissioner, if the same has been filed by any other licensee; or

(b) If actual current sales of the securities, at prices quoted, shall have been from time to time for not less than six months next preceding such disposal published in the regular market reports of the news columns of a daily newspaper of general circulation in this state; or

(c) Where there is a disposal of securities, the price paid or consideration rendered for which, in a single transaction, by one disposee, shall amount to five thousand dollars or more; or

(d) Where the securities disposed of are those of manufacturing or transportation companies, or of common carriers, or other public utilities, issued and outstanding in the hands of bona fide purchasers for value, prior to March 1, 1914, where such companies were, on said date, and shall be at the time of sale, actual going concerns, either directly or through lessees, and where there shall be at the time of sale no default in payment of any part of the interest or principal of such securities; or

(e) Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by such commissioner, or

(f) Where the disposal is made for a commission of less than one per centum of the par value thereof, by a licensee who is a member of a regularly organized and

recognized stock exchange and who has an established and lawfully conducted place of business in this state, regularly open for public patronage as such.

When Certificate Required.

3. In a limited class of securities **confined exclusively to securities issued for the purpose of organizing or promoting any company or assisting in the flotation of the securities of such company after organization,** such securities may not be sold **by the original issuer or his agent** until a certificate has been issued. In other words, after even these securities once have been floated certificates are no longer necessary. This certificate must be issued within a reasonable time and in any event within thirty days from the time of the application, if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted and that the proposed disposal of such securities is not on grossly unfair terms and that the issuer is solvent.

When Certificate Not Required.

A certificate is not required in the following cases:

(a) If actual current sales of the securities, at prices quoted, shall have been from time to time for not less than six months next preceding such disposal published in the regular market reports of the news columns of a daily newspaper of general circulation in this state; or

(b) Where the securities disposed of are those of a manufacturing or transportation company or of common carriers or other public utilities issued and outstanding in the hands of bona fide purchasers for value, prior to

March 1, 1914, where such companies were, on said date, and shall be, at the time of sale, actual going concerns, either directly or through lessees, and where there shall be at the time of sale no default in payment of any part of the interest or principal of such securities; or

(c) Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by the commissioner; or

(d) Where the disposal is made for a commission of less than one per centum of the par value thereof, by a licensee, who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted place of business in this state, regularly open for public patronage as such.

In other words, under this situation any security listed on the New York, Chicago, or any other regular stock exchange in the country, or a security which is offered by a member of any recognized exchange who has a place of business in this state, does not require a certificate, neither does it require any information to be filed by any dealer before same is offered for sale.

(e) Where the issuance of the securities has been approved by the public service commission or like body of any state of the United States or any province of the Dominion of Canada.

(f) Where the sale is made on behalf of an underwriter, who in good faith, and not for the purpose of avoiding the provisions of this act, purchases the securities so afterwards sold by him and pays therefor in cash or its equivalent, before attempting to sell same, not less than ninety per centum of the price at which such securities are thereafter sold by him.

(g) Where the securities are those of a common carrier.

(h) Where the securities are those of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal mining or quarrying and the whole or a part of the property upon which such securities are predicated is located within this state.

(i) The securities of a real estate or building company all of whose property upon which such securities are predicated is located within this state.

Where Information Only Required.

1. The right of the state to require that one not a bona fide owner disposing of securities for his own account, shall before disposing of securities otherwise than as a member of a regular stock exchange for a commission of less than one per centum, or of securities whose values are not ascertainable from the market reports of a daily newspaper published somewhere in the state, or in some standard manual of information, or the securities of manufacturing or transportation companies or of common carriers or other public utilities (wherever located) issued and outstanding prior to March 1, 1914, first file with the commissioner certain reasonable required information, is clear.

In the first place, every security listed on the New York stock exchange, the various other large exchanges of the country, as well as the securities foreign and domestic listed on every local exchange in Ohio, together with the securities of manufacturing or transportation companies or of common carriers or other public utilities (wherever located) which were issued and outstand-

ing on March 1, 1914, are exempted from the list of securities about which even information is required.

To say that a state may not under its police power require the brokers, agents and underwriters only (not the bona fide owner who is about to dispose of his security for his own account) to file with the state official, and at no expense whatever, a statement showing simply:

(a) The name, location of the principal office of the issuer, and the names of its officers and directors, or if a co-partnership, the partners;

(b) A statement of the issuer showing in general detail the assets and liabilities and capital stock of the issuer, as of a date as late as the close of its last fiscal year, and of its gross income, expenses and fixed charges for one year prior thereto, or for such time as the issuer has been in business, if less than a year;

(c) A pertinent description of such securities, and the purpose of the issue and the approximate price at which they are to be sold;

(d) If the securities be of a taxing district of any other state, territory, province or foreign government, and are not an obligation of the entire taxing subdivision and payable out of the proceeds of a general tax then the licensee must set forth the nature of the obligations, how payment is to be secured and that to the best of his knowledge there is no default in the payment of interest or principal and no adjudications adversely affecting, or pending suits questioning the validity of the same; is to say that there is no such thing as police power within any state. This proposition is so simple that its mere statement carries its own conclusive argument.

Where Certificate Required.

2. Now in addition to all of the classes of securities above referred to and **bearing in mind that certificates in any event only apply to securities issued in the organization or promotion of a company, or a flotation of securities after organization, and while the securities are still in the hands of the issued, or his agents,** there should still be taken out:

(a) All securities which have been approved by the public service commission, or a like body of any state of the United States, or any province of the Dominion of Canada.

(b) Where the sale is made by or on behalf of an underwriter, who in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterwards sold by him and pays therefor in cash, or its equivalent, before attempting to sell the same, not less than ninety per centum of the price at which such securities are thereafter sold by him.

(c) The securities of any common carrier.

(d) The securities of any company organized under the laws of the state of Ohio and engaged principally in the business of manufacturing, transportation, coal mining or quarrying, and the whole or a part of the property upon which such securities are predicated is located within this state.

(e) The securities of a real estate or building company all of whose property upon which said securities are predicated is located within this state.

And we will then have the small class of securities which require a certificate, and really it seems to us after a study of this law, that here also the mere statement of the proposition should carry its own conclusive argument in favor of its reasonableness. All of the courts without exception which have examined the various "blue sky laws" have admitted that under its police power the state had the right to prevent fraud in the sale of securities as well as in anything else.

Ohio Law Changed to Meet Decision of United States Court.

In the Michigan case (210 Fed. Rep., 173) the court in the opening of the per curiam opinion said:

> "We take judicial notice of the common understanding that this blue sky law was intended as is said by the attorney general to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations. If this intent had been carried into effect by the act as passed these cases would not be here; but scrutiny of the law discloses additional and very different effects. It is not confined to corporations, but covers partnerships issuing, and individuals dealing in securities; it does not relate alone to stocks, but as well to bonds, mortgages and promissory notes. It is not limited to investment companies as that term would ordinarily be defined, but extends the definition so that it may include most of the private corporations and partnerships in the United States; it does not cover fraudulent securities merely, but reaches and prohibits the sale of securities that are honest, valid and safe; it does not simply protect the unwary citizen against fraudulent misleading but it prevents the experienced investor from deliberately assisting an enterprise which he thinks gives sufficient promise of gain to offset the risk of loss, or from motives of pride, sympathy or charity he is willing to aid, notwithstanding a probability that his investment will prove unprofitable. Of course not all of these results will follow; but some of them always may and sometimes will."

This case was decided January 28, 1914.

This decision was immediately thereafter called to the attention of the general assembly of Ohio, then in extraordinary session, by the governor of Ohio in a special

message dated February 5, 1914, and showing that the law was specifically drawn through "the combined counsel of the attorney general, commissioner of insurance and superintendent of banks" to meet the decision in the Michigan case. The message of the governor to the general assembly is as follows:

"To the General Assembly:

There seems to be a well organized effort in this country to break down the so-called blue sky laws which have been passed under the police powers of the states for the purpose of protecting investors against fraudulent enterprises. An attack was made on the Iowa law, but the court held it to be constitutional. In Michigan, however, the federal court holds that the law is an unjustifiable exercise of the police power of the state.

The blue sky law adopted in Ohio has justified the principle suggested and vitalized by the Constitutional Convention.

The most careful investigation has been made of the provisions of the law and the trend of judicial logic in the trial of the cases in different parts of the country, and while there is common agreement in the thought that the state has the right, through its police powers, to protect its people against the exploitation of projects fraudulent in purpose and nature; still we must at all times be reminded that our legislation must assume such form as will keep it consistent with the federal provisions regulating interstate commerce; in short, we can afford to change the form of the Ohio law if it is obviously necessary to retain the substance and preserve the principle involved.

Notwithstanding the Michigan decision was rendered but a few days ago, the opinion has been fully digested, and a bill has been drawn, through the combined counsel of the attorney general, commissioner of insurance and superintendent of banks.

It is my recommendation that the language of the law be rendered less ambiguous, that the fees

charged be sufficient to meet the cost of the service, that the restrictions be so modified as to provide against constitutional infirmities, and that the commissioner be given the power, in proper instances, to grant temporary permits during the pendency of applications, so that legitimate business may not be hampered.

In the interest of the public service, I recommend action along these lines by the assembly.

(Signed) James M. Cox,
Governor."

The message of the governor was transmitted to the general assembly on February 5, 1914, and on February 6 the general assembly passed the law as drafted by the gentlemen referred to in the governor's message.

Ohio Law Designed to Prevent Fraud.

With the assistance of the attorney general's department the Ohio "Blue Sky Law" was amended to conform to the court's decision and opinion in the Michigan case and we respectfully submit that the Ohio "Blue Sky Law" now in force has for its sole object the prevention of fraud; that it seeks only "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations;" that it does not by any means cover all securities but is limited to securities of the class above referred to. So far as the law is applicable to securities themselves, the law does not relate to mortgage bonds or notes or even to corporate bonds where fifty per cent of the entire issue is included in a sale to one purchaser. Promissory notes are not covered in any manner, shape or form. The Ohio law is limited to regulating the

carrying on of business by dealers and does not affect seasoned securities. The Ohio law seeks to prevent the flotation of fraudulent securities only and does not in any manner, shape or form prevent or hinder the sale of honest, valid and safe securities. The Ohio law simply protects the unwary citizen against fraudulent misleading and in no wise "Prevents the experienced investor from deliberately assisting an enterprise which he thinks gives sufficient promise of gain to off-set the risk of loss or which from motives of pride, sympathy or charity he is willing to aid notwithstanding a probability that his investment will prove unprofitable." None of the results referred to in the Michigan case can follow under the Ohio law.

Any person may subscribe for all the stock, common or preferred, of any corporation he wants to. There is nothing to prevent his so doing.

Ohio Law Differs From Others Passed Upon by the District Courts.

Original Michigan Law.

The old Michigan "Blue Sky Law" differed vitally from the present Ohio law. In the case of Alabama & N. & O. Transportation Co., et al., v. Doyle, et al., 210 Fed Rep. 173, the court held:

> (Syl. 4) "Public Acts, Michigan 1913, No. 143, providing for the regulation of foreign and domestic investment companies in the sale of stocks, bonds and evidences of indebtedness within the state **in so far as** it authorized the commission to prohibit a sale of securities in case it should find that the sale in all probability would result in loss to purchasers, etc., **regardless of whether the securities were based**

on sufficient property to be probably good, was not a proper exercise of the police power to conserve the public welfare and was therefore unconstitutional as a deprivation of property or liberty without due process of law." (Black face ours.)

There is no analogous provision in the Ohio law. There is, however, in the Ohio law a provision that even as to the limited class of securities requiring certificates before being offered for sale the commissioner must issue such certificate unless it appears that the law has been violated, that the business of the applicant is fraudulently conducted or that the proposed disposal of the securities is upon grossly unfair terms, or that the vendor is insolvent. Even in the case of a refusal to issue such certificate, the issuer of the securities, whether resident or non-resident, has the right to appeal to the court of common pleas and have the matter determined there, and then, if not satisfied with the court's decision, has the benefit of error proceedings in the higher courts. (See Section 6373-16 G. C.)

In the fifth branch of the syllabus of the Michigan case, the could held:

> "Public Acts Michigan, 1913, No. 143, regulating the sale of securities in that state and providing that there can be no sale for a period of thirty days after the dealer or issuing company has furnished to the public commission the required data, is not within the police power of the state and is invalid as deprivation of property without due process of law."

There is no such provision in the Ohio law. On the contrary all applications for license must be acted upon within twenty days and pending the final disposition of

such application the commissioner may and does grant temporary permission to the applicant for license to transact business as a dealer under the act. (G. C. 6373-4.)

In the limited class of securities requiring certificates the certificate must be issued or refused within a reasonable time and in no event later than thirty days after the filing of the application.

It is the practice of the department to grant permission immediately to sell the securities where the data submitted does not disclose the necessity for further examination, or the commissioner has no other reasons for the exercise of greater caution, but as stated above in all cases the commissioner must act within thirty days.

In the seventh branch of the syllabus in the Michigan case the court held:

> "Public Acts Michigan, 1913, No. 143, providing for the regulation and supervision of foreign and domestic investment companies, their agents and other persons selling securities in Michigan, constitutes a direct interference with interstate commerce in stocks, bonds and commercial paper, which constitute a part of interstate trade and is therefore invalid."

On page 184 of the opinion the court says:

> "Is this a mere licensing law? So far as it affects the investment companies we see no similitude. **Engaging in a business is not regulated or permitted; it is the proposed individual transaction which is the subject of scrutiny. An investment company receives no license in substance or in form.** If it fully complies with the law and the issue and sale of stocks and bonds are approved, and if the next year or the next month it wishes to make another issue, which may be substantially similar, it is forbidden to do so until there is another submission

and another tacit approval. **To call such provisions the licensing of an occupation or business is a misnomer.** As to dealers there is more of the form of license. They are required to register and to pay a registration fee and are subject to the same general provisions and regulations. For this reason is said above that some parts of the act use a nomenclature of a license law. However, if this is a license to dealers, **it avails them nothing.** They cannot do one item of business until that item has passed scrutiny; hence it is clear that the dominant purpose is not to license and supervise individuals in the following of an occupation, but to regulate to the point of prohibition the business itself." (Black face ours.)

There is no such provision in the Ohio "Blue Sky Law." The Ohio "Blue Sky Law" as to dealers constitutes solely a **license upon** the **occupation and is solely for the prevention of fraud.** In only a limited class of cases is it required that the securities to be sold are themselves subject to inspection and in such instances there is clear justification under the police power of the state.

In the ninth branch of the syllabus in the Michigan case the court held:

> "Public Acts Michigan, 1913, No. 143, to provide for the regulation and supervision of sales of securities in Michigan having been held is so far as it gave the securities commission power to forbid the sale of securities **at less than what they thought was a proper price,** in so far as it directly and substantially burdened interstate commerce and also in so far as it forbade sales within thirty days **after** information concerning the securities was requested, etc., such provisions affecting the entire scheme of the act and no part of it could be sustained." (Black face ours.)

Under the Ohio law no power is lodged any place to forbid the sale of securities at less than what some authority thought was a proper price. Instead of forbidding sales until thirty days **after** information concerning the securities was requested, the Ohio law and practice permits the authority to be granted at once for the sale of the limited class of securities to which certificates are applicable and requires that in all cases that the certificate must be granted or refused within thirty days after the application, not within any time after information is requested. In the Michigan law there was no provision for affirmative action by the commission, but the law merely prohibited the sale of securities for the period of thirty days.

The court finds no fault with the law is so far as the prevention of fraud is an element thereto on the ground that the prohibition of such sales would be within the police power, but held that to permit the commission to refuse to approve the sale of notes, stocks, bonds or other securities because they found **that the constitution or by-laws or the proposed plan of business were not fair or that the securities were of such a nature and character that their purchase would in all probability result in loss to the purchaser**, were matters beyond the police power; in other words, that while the police power might be called into operation to prevent a fraud it could not be invoked to determine whether the company was properly managed or whether the price asked for the securities was sufficiently low to guarantee that there would be no loss to the purchaser.

The court especially dwells upon the fact that a company is prohibited from borrowing money on notes run-

ning longer than nine months or upon bonds secured by mortgage.

It is to be noted that promissory notes are not included in the present "Blue Sky Law." The Michigan law provides that the Supreme Court might review by certiorari any final order or determination of the commission. In commenting upon this the court in the above case said that:

> "There should be some judicial review beyond a mere writ of certiorari under which the commission's improvident finding of fact will be unassailable."

As already pointed out, the person, firm or corporation to whom a license is refused, or whose license is revoked, or the issuer of the limited class of securities requiring a certificate, to whom the certificate is refused or whose certificate is revoked may as of right appeal to the common pleas court of Franklin county for a reversal of the official action complained of. Summons is returnable in three days. An answer may be filed within one week. The court's decision shall consult only the rights of the plaintiff (the person applying for license or certificate) and the protection of the public, and the commissioner is forbidden to prosecute any proceedings to obtain a reversal, modification or vacation of the judgment issued in favor of the plaintiff and in such event must forthwith issue the license or the certificate. On the other hand, the person applying for the license or certificate may prosecute error the same as in civil actions. (G. C. 6373-8 and 6373-16.)

In the course of the opinion in the Michigan case the court said:

> "For example, it is difficult to see why one rule should be applied to an individual who gives a trust mortgage upon his property securing a series of notes and bonds and a different rule to a partnership which does the same thing."

Under the Ohio law there is no difference or distinction of any kind between a natural person, a partnership, joint stock association or corporation in this respect.

The Michigan law has many other restrictive features that are not embodied in the Ohio law.

Original West Virginia Law.

The West Virginia act, which was passed on in the case of Bracey, et al., v. Darst, et al., 218 Fed. Rep., 482, (by a divided court) required certificates for the sale of every kind of securities, except:

(A) Bonds of United States.

(B) Or some county, district or municipality in the the state.

(C) Notes secured by mortgage on real estate located in the state.

The West Virginia law did not permit a bona fide owner of stock purchased in good faith to sell same without complying with the terms of the "Blue Sky Law." As said by the court (page 490):

> "The West Virginia act must by its terms be construed to regulate individuals, co-partnerships, corporations or associations seeking to engage in the business of buying and selling stocks, bonds and securities of **'any kind or character'** other than those expressly exempted. In other words, to pre-

> vent any such person, corporation, etc., from selling in the state any obligation of any corporation, whether doing business in the state or not, **which had not the auditor's permission to do business therein.** The sweeping effect of such provision is at once apparent as it would substantially limit the brokerage business in the state and the purchase by its citizens of standard foreign securities, which would have to be sold by them outside of the state." (Black face ours.)

As has been pointed out, the Ohio "Blue Sky Law" in no wise affects the standard securities of the country which are quoted upon the stock exchanges or whose quotations regularly appear in any newspaper circulated within this state or in any manual of information approved by the commissioner in this state.

As has been pointed out at other places in this brief, only a limited class of securities require a certificate and this requirement as to this class is clearly within the police power of the state.

The court (page 491) in examining the acts of Arkansas, Kansas, Iowa and Michigan, says that the acts of Kansas, Arkansas and West Virginia are substantially alike, that

> "Each seek to make an 'investment company' out of any individual, co-partnership, corporation or association seeking to sell **any** bonds, stocks or securities of **any kind or character**." (Black face ours.)

There is a vast difference between such a law and the Ohio "Blue Sky Law."

At page 493 the court says:

> "It is now substantially admitted that if its intent is to prevent a citizen from selling his own notes or other obligations or bonds or securities,

> etc., which he may have acquired in the course of business, without a certificate from the auditor of solvency and 'sound business capacity,' it is clearly subversive of the inalienable right he has to acquire and sell property and its validity cannot be asserted."

The Ohio law in no manner, shape or form forbids, restricts or regulates the sale by any person, resident or non-resident, of securities purchased in good faith in the usual course of business and for his own account.

The court further said (page 493):

> "It cannot for a moment be questioned that the words of the first section of this West Virginia act, defining those subject to its provision, are equally, if not more particular, minute and inclusive than similar defining words contained in the Iowa, and Michigan cases with which and others in its provisions this West Virginia act is largely identical."

Arkansas Law.

In the Arkansas case, Standard Home Company, v. Davis, 217 Fed. Rep., 904, the bill of plaintiff seeking to enjoin the "Blue Sky Law" was dismissed for failure to show a cause of action under the rule that a statute will not be declared unconstitutional at the instance of one not affected by it.

The Florida "Blue Sky Law" was upheld by the Supreme Court of Florida in the case of Ex Parte Taylor, 66 Southern Reporter, 292. A hasty examination of this law, however, shows that it applies only to corporations and therefore is not helpful in the determination of the present case.

Iowa Law.

The Iowa statute in the case of Compton et al. v. Allen, 216 Federal Reporter, 537, was held invalid for reasons that do not in any wise exist in the Ohio statute.

Using the second branch of the syllabus in that case as a summary of the law:

> "Acts 35th General Assembly Iowa, chapter 137, commonly termed the 'Blue Sky Law' which by its term prohibits a '**citizen of a sister state** owning and having stocks, bonds, certificates or securities, **although the same are listed on the exchanges of the country and have a well established actual and salable** value, from either bringing or sending them into the state for sale or negotiations for sale to any person in the state unless he complies with the requirements of the act by obtaining from the secretary of state and paying for a certificate as an investment company or stock broker and subjecting himself to its penalties." (Black face ours.)

The Ohio "Blue Sky Law" does not prevent any owner, whether a resident of the state or of any other state or foreign country, who is the bona fide owner of a security, from disposing of the same for his own account, either directly or through any brokerage firm. (G. C. 6373-2 (a)).

The Ohio "Blue Sky Law" does not apply to stocks listed on the exchanges of the country or to stocks which have well established and salable value. (G. C. 6373-10.)

In the course of the opinion in the above case the court said:

> "The mere reading of the act in question makes **entirely clear the contention of complainants and intervenors that it does impose burdens upon and**

> denies privileges to citizens of other states which are not imposed upon and which are granted to citizens of Iowa."

The Ohio law treats citizens and persons domestic and foreign alike.

Every one of the grounds upon which the Iowa statute was held unconstitutional being absent from the Ohio "Blue Sky Law," the Iowa case cannot be considered as a precedent.

ASSIGNMENTS OF ERROR.

Cause No. 438, Hall, Etc., v. The Geiger-Jones Company Record, p. 48).

"First: That the court erred in granting the interlocutory injunction against said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, his employes and subordinates, and each of them individually, from enforcing or attempting to enforce the provisions of Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, contained in Volume 103 of the Laws of Ohio, pages 743-753, and the acts amendatory thereof.

Second: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void, as being in violation of Section 8 of Article I of the constitution of the United States.

Third: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void as being in violation of Section 1 of Article XIV of the constitution of the United States."

Cause No. 439, Hall Etc., v. Coultrap (Record, p. 40).

Same as in Cause No. 438 above quoted.

Cause No. 440, Hall, Etc., v. Rose, et al. (Record, p. 52).

"First: That the court erred in overruling the motion to dismiss the bill of complaint filed by defendants herein.

Second: That the court erred in sustaining the motion of complainants for an interlocutory injunction and in granting the interlocutory injunction against said defendants, Harry T. Hall, superintendent of banks and banking of the state of Ohio; Cyrus Locher, prosecuting attorney of Cuyahoga county, and William T. Smith, sheriff of Cuyahoga county,

Ohio, their employes and subordinates, and each of them individually, from enforcing or attempting to enforce the provisions of Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, contained in Volume 103 of the Laws of Ohio, pages 743-753, and the acts amendatory thereof.

Third: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void as being in violation of Section 8 of Article I of the constitution of the United States.

Fourth: That the court erred in declaring Sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, unconstitutional, null and void as being in violation of Section 1 of Article XIV of the constitution of the United States.''

ARGUMENT.

This argument will be divided into three parts:

(A) Questions peculiar to the individual cases independent of the validity of the Ohio Blue Sky Law;

(B) Showing that the reasoning of the court in the original Michigan case (which the court below followed in the instant cases) was founded upon the false premise that Nathan v. Louisiana and Paul v. Virginia were overruled by the Lottery Case.

(C) The question of the validity of the Ohio Blue Sky Law, which will be divided into two parts:

1. An argument dealing with the opinion of the court below wherein it is sought to show that the premises upon which the court below based its decree are not in keeping with but are contrary to the law as interpreted by this court.

2. Certain propositions of law for which we contend and which, if correct, amply authorize the enactment by the legislature of Ohio of the blue sky law.

A. QUESTIONS PECULIAR TO INDIVIDUAL CASES.

While the right of the state to enact blue sky legislation is of course the principal question involved in the three instant cases, yet there are three other questions which are also of much importance to the state of Ohio and which, if left unreversed, will form a precedent upon which will surely be builded further and graver encroachments along the same line. These questions may be stated as follows:

1. Where a state has brought a criminal action against one of its own citizens found within its jurisdiction, in which action the defendant may raise and preserve all questions, state and federal, and where after an adverse decision in the highest court of the state, defendant may prosecute error to this court, may a federal court thereafter by injunction restrain the action of the officers of the court, which officers are acting by virtue of valid constitutional authority as such officers.

2. May a foreign corporation, which has not complied or attempted to comply with the laws of the state of Ohio regulating the admission to do business within the state by foreign corporations, and which foreign corporation claims to have its principal office and place of doing business in the state of Ohio, question the laws of the state of Ohio regulating the conduct of all persons doing a particular business within that state? Phrasing it differently and more concretely: Did The RiChard Auto Manufacturing Company, whose bill in equity shows it to be "a corporation organized and existing by virtue of the laws of the **state of West Virginia,** with its **principal office and place of doing business in the city of Cleveland, county of Cuyahoga and state of Ohio"**, not having complied with Sections 178, 179 and 183, or either of them, of the General Code of Ohio, all of the facts being before the court (Record pp. 1, 23 and 24), have any standing as a plaintiff in the court below?

(The foregoing questions apply to Case No. 440, Hall v. Rose et al.)

3. May an Ohio corporation question the right of the state of Ohio, under the constitution of the state of Ohio, to regulate in any manner its method of doing business?

(The foregoing question applies to Causes Nos. 438 and 439, Hall v. The Geiger-Jones Co. and Same v. Coultrap.)

In addition to the foregoing propositions it is contended that, irrespective of the validity of the Ohio Blue Sky Law, neither of the bills below contain facts sufficient to authorize the action of the court below under the doctrine laid down and followed in many cases by this court, to wit:

> "One who would strike down a statute as violative of the federal constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional."

(This doctrine has been applied by this court not only in cases under the Fourteenth Amendment, such as **The Standard Stock Food Co. v. Wright** and **District of Columbia v. Brooke,** but also where the question of interstate commerce has been raised as in the case of **New York v. Reardon, 204 U. S. 152-160.**)

As to Cause No. 440, Hall v. Rose et al.

1. The bill in Cause No. 440 shows that the state courts obtained jurisdiction over the plaintiff Rose on the twenty-fifth day of September, A. D. 1914, and that he was thereafter indicted by the grand jury of Cuyahoga county, Ohio, for a violation of the act which he seeks to have declared unconstitutional and void and by which bill he seeks to interfere with the action of the Court of Common Pleas of Cuyahoga county, Ohio, by restraining its officers, the prosecuting attorney and the sheriff.

In addition to the allegations of the petition relied upon, the defendants filed in support of the motion to

dismiss (Record p. 23) a transcript from the Court of Common Pleas of Cuyahoga county, Ohio (Record p. 24), showing that the same defendant, William R. Rose, was indicted on December 8, 1914; was arraigned a few days later and plead not guilty; released on bond December 21, 1914; date of trial set; defendant did not appear; bond forfeited; capias issued; was tried November 9, 1915, found guilty and filed motion for a new trial, which motion for a new trial was pending at the time of the filing of the bill below.

Section 265 of the Federal Judicial Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

As was said in the case of **In re Ayers, 123 U. S. 443-497,** by Mr. Justice Mathews, speaking for this court:

> "How else can a state be forbidden by judicial process to bring action in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court, as an actual and real defendant?"

In the case pending in the Common Pleas Court of Cuyahoga county, Ohio, the state of Ohio was plaintiff and Rose was defendant. Certainly the enjoining of the prosecuting attorney and the sheriff was just as effectively an injunction staying the proceedings in a court of the state as if the process had been directed to the judge himself. The proceedings could not be carried

on in this case without the prosecuting attorney and the sheriff.

Neither the prosecuting attorney nor the sheriff had any particular duty, or any duty of any kind for that matter, enjoined upon them by the terms of the Ohio Blue Sky Law. The duties of the prosecuting attorney are defined in Chapter 9 of Title X, Division II, of the General Code of Ohio, being Sections 2909 to 2926, inclusive. Generally speaking, the duties of the prosecuting attorney are set forth in Section 2916 G. C. (as amended 103 O. L. 419):

> "The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute on behalf of the state all complaints, suits, and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county in the probate court, common pleas court and court of appeals. * * *"

The duties of a sheriff are set forth in Chapter 7, Title X, Division II of the General Code of Ohio, being Sections 2823 to 2855-2, inclusive, Section 2834 providing:

> "The sheriff shall execute every summons, order or other process, make return thereof as required by law and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law."

Section 2833 of the General Code provides:

> "* * * He (the sheriff) shall attend upon the Common Pleas Court and Court of Appeals during their sessions, and, when required, upon the Probate Court."

The case of **Fitts v. McGhee, 172 U. S. 516,** is on all fours with the instant case. As stated by **Mr. Justice** Harlan (page 524):

> "The principal question before us is whether this suit is one of which a Circuit Court of the United States may take cognizance consistently with the Constitution of the United States.
>
> From the history given of the proceedings below it appears that the Circuit Court adjudged—
>
> That the legislative enactment of February 9, 1895, was unconstitutional and void in that it did not permit the owners of the Florence bridge, and the plaintiffs as their representatives, to charge rates of toll that were fairly and reasonably compensatory; and,
>
> That the defendants Fitts and Carmichael, holding respectively the offices of attorney general of Alabama and solicitor of the Eleventh Judicial Circuit of the state, should not institute or prosecute any indictment or criminal proceeding against anyone for violating the provisions of that act."

After making this statement in the opinion Mr. Justice Harlan then takes up the question present in the instant case—whether or not a citizen of a state can bring such an action against the officials of his own state. Mr. Justice Harlan proceeded:

> "Is this a suit against the state of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state. **But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by the law**, as much so as suits against a state by citizens of another state of the Union, or by citizens or subjects of foreign states. Hans v.

Louisiana, 134 U. S. 1, North Carolina v. Temple, 134 U. S. 22. **It is therefore an immaterial circumstance in the present case that the plaintiffs do not appear to be citizens of another state than Alabama, and may be citizens of that state.**

We are of the opinion that the present case comes within the principles announced in In re Ayers, 123 U. S. 443."

(Blackface ours.)

The entire opinion of the court is appropriate to the present case. At page 529 of the opinion it is said:

"If these principles be applied in the present case there is no escape from the conclusion that, although the state of Alabama was dismissed as a party defendant, this suit against its officers is really one against the state. As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state. In the case supposed, they would be compelled to make good the state's claim to the property, and could not shield themselves against suit because of their official character. Tindal v. Wesley, 167 U. S. 204-222. No such case is before us.

It is to be observed that neither the attorney general of Alabama nor the solicitor of the Eleventh Judicial Circuit of the state appear to have been

charged by law with any special duty in connection with the act of February 9, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were Poindexter v. Greenhow, 114 U. S. 270; Allen v. Baltimore & Ohio R. Co. 114 U. S. 311; Pennoyer v. McConnaughy, 140 U. S. 1; In re Tyler, 149 U. S. 164; Reagan v. Farmers' L. & T. Co. 154 U. S. 382-388; Scott v. Donald, 165 U. S. 58, and Smyth v. Ames, 169 U. S. 466. Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. **There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.** In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of ques-

tions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespass or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; **for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.**"

(Blackface ours.)

Further on the court said (page 531):

"It remains only to consider the case so far as the final decree assumes to enjoin the officers of the state from instituting or prosecuting any criminal proceedings having for their object the enforcement of the statute of 1895. We are of opinion that the Circuit Court of the United States, sitting in equity, was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the state court."

It is a general rule of equity that a court is without jurisdiction to restrain criminal proceedings and therefore Section 265 of the Federal Judicial Code ought to be construed even more strictly against the courts where attempt is made, directly or indirectly, to interfere in a criminal case. In addition to the fact that a state cannot, without its consent, be sued and that the attempted restraining of these officers through whom the state must needs act and who have no particular duty en-

joined upon them by the law in question, is in substance an action against the state, and in addition to the plain provisions of Section 265 of the Federal Judicial Code, there is the well recognized doctrine of comity.

The proposition of comity applicable alike to all cases, civil or criminal, is stated by Mr. Justice Mathews in the case of **Covell v. Heyman, 111 U. S. 176-182**:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, **it is something more. It is a principle of right and law, and therefore of necessity**. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that **res** is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."
>
> (Blackface ours.)

The foregoing was quoted with approval by Mr. Chief Justice Fuller in the case of **In Re Tyler, 149 U. S. 164-186.**

In the case of **Harkrader v. Wadley, 172 U. S. 148,** this court by Mr. Justice Shiras said (page 164):

> "When a state court and a court of the United States may each take jurisdiction of the matter the tribunal where jurisdiction first attaches, holds it to the exclusion of the other, until its duty is per-

formed and the jurisdiction involved is exhausted; **and this rule applies alike in both civil and criminal cases.**"

(Blackface ours.)

The court below erred when it did not sustain the motion to dismiss as to Rose.

2. Section 178 of the General Code of Ohio provides as follows:

"Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. **No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate.** This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

(Blackface ours.)

Section 179 of the General Code of Ohio provides:

"Before granting such certificate, the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: The amount of capital stock of the corporation, the business in which it is engaged or in which it proposes to engage within this state; the proposed location of its principal place of business within this state; and the name of a person designated as provided by law, upon whom process against the cor-

poration may be served within this state. The person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation."

Section 183 of the General Code of Ohio provides:

"Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and [illegible] par value of each share.

2. The name and location [illegible] e or offices of the corporation in Ohio [illegible] ames and addresses of the officers [illegible] e corporation in charge of its busine[illegible] hio.

3. The value of the p[illegible]erty owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio."

Section 187 of the General Code of Ohio provides:

"A foreign corporation which has violated such preceding sections shall not maintain an action in this state upon contract made by it in this state, until it has complied with the requirements of such sections and procured the requisite certificate from the secretary of state."

Section 188 of the General Code of Ohio provides:

> "The preceding five sections shall not apply to * * * foreign corporations entirely non-resident soliciting business or making sales in this state by correspondence or by traveling salesmen."

In support of the motion to dismiss as to The RiChard Auto Manufacturing Company (Record page 23) there was submitted the affidavit of William H. Guyton, the duly appointed, qualified and acting assistant secretary of state of Ohio, who made oath as follows (Record p. 24-25):

> "Affiant further says upon oath that The RiChard Auto Manufacturing Company, a corporation organized under the laws of West Virginia, has not complied with the requirements of law authorizing said corporation to do business within the state of Ohio; that said corporation has not procured from the secretary of state of Ohio a certificate that said corporation has complied with the requirements of law to authorize it to do business in Ohio; nor has said corporation filed in the office of the secretary of state of Ohio any of the information required by Sections 178, 179 and 183 of the General Code of Ohio, or either of them."

In the case of **National Mercantile Co. v. Watson, 215 Fed. Rep., 929,** it was held:

> "A foreign corporation unauthorized to do business in Oregon because of failure to file the certificate required by the laws of Oregon, is not entitled to sue in the federal court for the district of Oregon."

This was a case like the instant case where a foreign corporation sought to attack the constitutionality of the Oregon Blue Sky Law and was heard before Gilbert, Circuit Judge, and Wolverton and Bean, District Judges, on

July 27, 1914. In that case a plea in abatement was sustained against the bill of plaintiff upon the ground that the plaintiff, a foreign corporation, had not complied with the laws of Oregon authorizing it to do business within the state of Oregon.

The RiChard Auto Manufacturing Company was not engaged in interstate commerce. Its bill shows it to be not even a going concern. It claimed Cleveland, Ohio, as the location of its principal office and place of doing business (Record page 1) and claimed that the state of Ohio was preventing it from selling in Ohio its corporate stock. Even if shares of corporate stock be held to be subjects of interstate commerce, yet transportation of those certificates from one state to another is necessary to stamp them with such character. The RiChard Auto Manufacturing Company was not transporting certificates of its corporate stock from one state to another. While it claimed to be a West Virginia corporation it was attempting to sell these certificates of its own stock in Ohio with its principal office and place of business located in Ohio. This matter was wholly an intrastate transaction.

As said by Mr. Justice Harlan in the case of **Broadnax v. Missouri, 219 U. S. 285-293**:

> "But the Federal Constitution does not confer a liberty to disregard business regulations as to the conduct of business which the state lawfully establishes for all within its jurisdiction."

By failing to comply with the laws of Ohio, which gave it the right to do business in Ohio, it not being a federal agency, The RiChard Auto Manufacturing Co. had no standing in any court in Ohio and was and is liable to ouster.

Therefore it was not in position to complain about Ohio laws regulating the method of doing a business, which until it had complied with the other laws of the state of Ohio it had no right to transact with or without a license.

We think that the rule quoted by Mr. Justice Hughes in the case of **Standard Stock Food Company v. Wright, 225 U. S. 540-550,** applies here:

> "The case in this aspect falls within the established rule that 'one who would strike down a statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution' (citing a number of cases,"

as well as the rule laid down by Mr. Justice McKenna in the case of the **District of Columbia v. Brooke, 214 U. S. 138-152,** wherein after stating:

> "Other criticisms are made of the law to display what is alleged to be its lack of uniformity. For instance, a supposition is made of tenants in common, some of whom are residents and others non-residents, and the possible difficulties that may arise from such ownership under the act, and it is asked if the property belongs to resident minors, insane persons or persons under legal disability, can the act be enforced against them or against their property?"

Mr. Justice McKenna said:

> "To these suppositions and questions we answer that it will be time enough to reply when a case arises in which they are presented and to determine then the operation of the act upon the persons enumerated."

In the case of **New York v. Reardon, 204 U. S., 152,** this court by Mr. Justice Holmes said in the course of the opinion (page 160):

> "The other ground of attack is that the act is an interference with commerce among the several states. Cases were imagined which, it was said, would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases, it was void as to them, and if void as to them, void altogether on the principle often sated. * * *
>
> But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belong to the class for whose sake the constitutional protection is given or the class primarily protected, this court does not listen to his objections and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

Therefore the motion to dismiss the bill of plaintiffs Rose and The RiChard Auto Manufacturing Company ought to have been sustained.

3. **As to Causes 438, Hall v. The Geiger-Jones Co. and 439, Same v. Coultrap.**

(a) The Geiger-Jones Company shows in its bill that it is an Ohio corporation, organized and existing under and by virtue of the laws of the state of Ohio.

Original Section 2 of Article XIII of the constitution of Ohio as adopted in 1851, until the amendment of 1912, read:

> "Corporations may be formed under general laws; but such laws may from time to time be altered or repealed."

The amendment of 1912 added this language:

> "Corporations may be classified and there may be conferred upon proper boards, commissioners or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual."

It will be observed that this amendment authorizes the enactment of laws regulating the issue of and sale of the securities of a corporation as well as the business of dealing in corporate securities.

No powers may be granted to an Ohio corporation which may not be altered or repealed. The legislature of Ohio has the right to say and has said that corporations may be formed for certain purposes only. It has the further power to say that no corporation organized under the laws of the state of Ohio shall engage in interstate commerce. Of course, there is no probability of any such legislation and the foregoing statement is made only to show that an Ohio corporation cannot complain of any regulation affecting either its right to issue or to sell its securities or to deal in the securities of other corporations, domestic or foreign. The state having authorized a corporation to deal in securities, it has the right thereafter to limit the method of doing that business by a corporation.

(b) Surely if Hatch, a resident of Connecticut, who sold in New York to one Maury, also a resident of Connecticut, but doing business in New York, one hundred

shares of the stock of the Southern Railway Company, a **Virginia corporation**, and one hundred shares of the Chicago, Milwaukee & St. Paul **Railroad** Company, a **Wisconsin corporation**, and on the same day and in the same place **received payment** and delivered the **certificates**, was not **engaged** in **interstate commerce**, as was held by this court in the case of **New York v. Reardon, 204 U. S. 152,** wherein this court speaking through Mr. Justice Holmes said (page 161):

> **"There is not a shadow of a ground for calling the transaction described such commerce."**
>
> (Blackface ours.)

then the selling within the state of Ohio to persons within the state of Ohio of corporate stocks or securities of "corporations organized and existing under and by virtue of the laws of Ohio and other states and foreign countries," (Record, p. 2) by The Geiger-Jones Company, an Ohio corporation, with its principal place of business in Ohio, was certainly not interstate commerce, nor did the fact that Coultrap, **the agent of The Geiger-Jones Co.**, who claimed to be residing in Pennsylvania, made trips into **Ohio** for the purpose of selling stocks as agent of The Geiger-Jones Company, an Ohio corporation (Record, p. 3), or the fact that he received the certificates from his principal in Ohio and delivered them by mail to customers in Ohio, show that he (Coultrap) was engaged in interstate commerce. Coultrap was seeking to prevent the cancellation of his principal's license, claiming thereby that he as agent of his principal would not then be able to come into Ohio and make sales in Ohio on behalf of his principal, an Ohio corporation,

The Ohio Blue Sky Law in no wise prevented The Geiger-Jones Company from buying foreign stocks, bonds, etc., nor did it prevent them from selling outside of the state of Ohio, directly or through agents, domestic or foreign securities. The Geiger-Jones Company does not claim to be brokers who buy and sell for the account of customers. Their bill shows them to be what is commonly known as underwriters—a concern that buys an issue of securities and then retails it. There is no showing of a soliciting of orders in a foreign state, such as in the Drummer cases. The business of The Geiger-Jones Company, so far as affected by the Blue Sky Law, is intra-state. There is not disclosed in their bill any question of **transportation**. Certainly The Geiger-Jones Company cannot manufacture a case of interstate commerce by having its agent claim that it sends him (the agent) certificates of stock by mail and that thereafter that same agent "conducts a correspondence from the state of Pennsylvania to the state of Ohio and receives certificates evidencing the ownership of said stocks from the state of Ohio and sends the certificates resulting from the sale of said stocks, from the state of Pennsylvania to the state of Ohio." (Coultrap record, p. 3.)

As said by this court in the opinion of Mr. Justice McKenna in the case of **New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495-509**:

> "This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character * * * Nor again does the use of the mails determine anything * * *. That they may live in different states and hence use the mails for their communications does not give character to

what they do; cannot make a personal contract the transportation of commodities from one state to another, to paraphrase Paul v. Virginia. Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails."

As to the Coultrap bill: This bill shows on its face that it was filed in violation of Equity Rule 37, which requires that every action shall be prosecuted in the name of the real party in interest. The bill shows that Coultrap brought the action below as an agent of The Geiger-Jones Company for the purpose of preventing the cancellation of The Geiger-Jones Company's license.

Coultrap also alleges that he is a **dealer** in securities, but does not claim to be operating under a dealer's license. He alleges no attempted interference with him as such dealer by the state or any of its officers. If Coultrap was, as he stated in his petition, dealing in securities, then he was in no position to raise any question as to the constitutionality of the Ohio Blue Sky Law unless and until the state attempted to punish him for dealing in securities in Ohio without a license.

So far as Coultrap was the **bona fide** owner of any securities, he might, under Section 6373--2 (a) of the General Code of Ohio, dispose of them for his own account without reference to the Blue Sky Law.

The Blue Sky Law does not attempt to interfere with Coultrap or anybody else selling securities from Pennsyvlania to Ohio, or from Ohio to Pennsylvania.

Coultrap cannot claim that interference with his peddling in Ohio for his principal, The Geiger-Jones Com-

pany, an Ohio corporation, is a restriction upon interstate commerce.

Coultrap has no right of his own to complain of the threatened cancellation of The Geiger-Jones Company's license on the ground that he is an agent of The Geiger-Jones Company, yet that is exactly what he sets up in his bill.

Interstate commerce cannot be created by a principal sending an article of commerce from the state of Ohio to his own agent in Pennsylvania and then that agent in Pennsylvania sending it back to a customer in Ohio. The agent for and on behalf of his principal is transacting nothing but intrastate commerce. The purchaser of the article has no relation with anyone save the principal because **qui facit per alium facit per se**.

Coultrap had no license from the state of Ohio except as an agent of The Geiger-Jones Company, and the affidavit of the superintendent of banks (Record Cause 439, p. 22) shows that The Geiger-Jones Company registered Coultrap as an agent **residing** in the state of Ohio, in the city of Sidney and the county of Shelby. Coultrap complains about some threatened cancellation of a certificate of stock, but does not show to what particular certificate he refers. Practically all of the companies mentioned by him do not require any certificates for their securities, the only exception being The Geiger-Jones Company and The Moberly Paving Brick Company, both Ohio corporations, and by reason of their not being engaged principally in manufacturing with the property upon which the securities have been issued located in Ohio a certificate is necessary prior to the sale of such securities.

But Coultrap would in no wise be injured even if it were contemplated to cancel the certificate of either of these companies' securities. If he is the **bona fide** owner of any securities issued by such companies he has a right to sell them independent of the Blue Sky Law.

The constitutional provisions as well as the laws of Ohio under which the particular corporate stocks of which he complains were issued became a part of his contract when he purchased such stocks and he has no right to complain if the state of Ohio thereafter should limit the right of the particular corporations to issue any other or further stock. On the other hand, if Coultrap be an agent of The Geiger-Jones Company and simply selling securities as an agent of The Geiger-Jones Company in Ohio, the securities being those of Ohio corporations, there certainly can be no element of interstate commerce therein involved.

(c) The whole purpose as disclosed by the bills of each The Geiger-Jones Company and Coultrap, their agent, is

1. To prevent the attorney general of Ohio from advising the superintendent of banks regarding his duty in the premises thereby making public certain practices of The Geiger-Jones Company.

2. To prevent the cancellation of the license as a "dealer" under the Blue Sky Law of The Geiger-Jones Company.

Both of these plaintiffs below (The Geiger-Jones Company and Coultrap, their agent) were in the ridiculous position of asking the court to prevent the superintendent of banks of Ohio from cancelling a license which amounted to nothing if their contention be right that the

law under which said license was granted was unconstitutional and void. Their principal concern, as shown by the respective bills, was to prevent the attorney general of Ohio from disclosing anything he might know regarding said The Geiger-Jones Company. The court will observe that the major portion of the bills of both The Geiger-Jones Company and Coultrap are taken up with this feature of the case by way of statement and reiteration. Paragraph 4 of the bill of The Geiger-Jones Company (Record p. 3) and Paragraph 8 of the bill of Coultrap (Record p. 5) are typical of this feature of the case, but the court will find it restated in other paragraphs.

The following is quoted from Paragraph 4 of The Geiger-Jones transcript (Record, p. 3):

> "Said defendant, Edward C. Turner, attorney general of the state of Ohio, without authority or without justification in law, threatens to and will, unless restrained by this court, give to said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, a written certificate, opinion or recommendation advising and directing said defendant, Harry T. Hall, superintendent of banks and banking aforesaid, to revoke the license now held by this plaintiff; and said defendant, Edward C. Turner, threatens to and will cause said certificate, opinion or recommendation to become and remain a public document in the files of said superintendent of banks and banking and to cause the same to be published broadcast by the newspapers of the said state and country to the great and irreparable damage to this plaintiff and said eleven thousand security holders and to their irremediable wrong, all without warrant or justification in law. * * *"

The following is Paragraph 8 of the Coultrap bill (Record pp. 4-5):

> "Said defendant, Edward C. Turner, attorney general of the state of Ohio, also without authority or justification in law, threatens to and will, unless restrained by order of this court, give to said defendant, Harry T. Hall, superintendent of banks and banking of the state of Ohio, under the guise of a written opinion pretended to contain only legal advice, a written statement, certificate, recommendation or finding that the said The Geiger-Jones Company has violated the provisions of said 'Blue Sky Law' and that existing facts require the cancellation of the certification of the stocks of said companies hereinbefore enumerated, whereas said Edward C. Turner, attorney general of the state of Ohio, is without power or authority to make or give any such statement, certificate, recommendation or finding, and said defendant, Edward C. Turner, attorney general of the state of Ohio, threatens to and unless restrained will cause said opinion and said statement, certificate, recommendation or finding to become and remain a public document in the files of said superintendent of banks and banking, and to cause the same to be published broadcast by the newspapers of the said state and country to the great and irreparable damage to this plaintiff, whose business will be unduly and unlawfully interfered with and whose stocks, because of such threatened unlawful proceedings on the part of said attorney general and said superintendent of banks and banking will become at once difficult to market and unduly depreciated in value, not because of lack of any inherent worth in said stocks, but because of said threatened unwarranted proceedings."

The court below refused to grant any relief against the attorney general, which left nothing before the court but the question of the cancellation of the license.

All licenses under the Blue Sky Law expire on December 31st of each year (General Code of Ohio, Sec.

6373-4). The Geiger-Jones Company filed its bill on November 17, 1915, while Coultrap filed his bill on November 22, 1915, and pending a decision of the cases the license expired by limitation of time. The attention of the court below was called to this fact and that court said in its opinion (Record Cause 438, p. 45):

> "The licenses mentioned in the first two of the above entitled causes expired on December 31, 1915. No occasion, therefore, exists for enjoining their cancellation. The bill in each of them is drawn on narrow lines. The prayer of each, however, taken in conjunction with certain averments is such as to warrant the temporary enjoining of the defendants therein named against enforcing or attempting to enforce the statute in question."

We submit that the bills of The Geiger-Jones Company and Coultrap were drawn on narrow lines and that the court below had no alternative but to dismiss them.

The court said that the prayer may be "taken in connection with certain averments." The court does not attempt to point out and a search of the bill will fail to disclose any averments which will help the prayer in this particular.

(d) The plaintiffs below had a plain, adequate and complete remedy at law. If the license had been issued under an unconstitutional law the cancellation of it deprived the holders of nothing. They could not thus be injured. If any prosecution were attempted they could set up the unconstitutionality of the act as a defense and if necessary have the protection of the Supreme Court of the United States.

There is not the slightest intimation in the bill of either the Geiger-Jones Company or Coultrap that what they denominated the written certificate, opinion or recommendation of the attorney general, would contain any facts concerning The Geiger-Jones Company that were untrue or even unfair. They plead simply in substance that a disclosure of the facts regarding The Geiger-Jones Company will cause them great and irreparable injury. If The Geiger-Jones Company was fraudulently conducting its business and the facts contained in the attorney general's opinion disclosed this, there might be "great and irreparable injury" to The Geiger-Jones Company from their point of view, but it would not be great and irreparable injury in the eyes of the law.

We respectfully submit that neither The Geiger-Jones Company nor Coultrap was in a position to complain and that therefore the doctrine enunciated in many cases in this court and reiterated in the cases of **The Standard Stock Food Company v. Wright, 225 U. S. 540-550,** in the case of the **District of Columbia v. Brooke, 214 U. S. 138-152,** and in the case of **New York v. Reardon, 204 U. S. 152-160,** that

> "One who would strike down a statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional."

B — DECISIONS HOLDING BLUE SKY LEGISLATION INVALID BASED UPON FALSE PREMISE THAT NATHAN V. LOUISIANA AND PAUL V. VIRGINIA OVERRULED BY LOTTERY CASE.

It was Lord Mansfield, I believe, who said in substance that the common law did not consist of decided cases—that decided cases were useful only as illustrations of the application of the eternal principles of the common law.

The decisions in the Blue Sky cases exhibit the danger of accepting the court's reasoning in the decided cases as law without an examination of the principles upon which it is founded and show how a case wrongly decided may sometimes become like a snowball rolling down hill in the freshly fallen snow.

In the month of January, 1914, two sets of Blue Sky cases were pending in the district courts of United States; one before a single judge in Iowa and the other, in compliance with Section 266 of the Federal Judicial Code, before three judges in Michigan. The first case was decided on January 13, 1914, by Judge Smith McPherson. His letter to the attorneys enclosing a copy of the decree tells the whole story and is as follows:

> "Gentlemen: I today file a decree in the case of William R. Compton et al. v. W. S. Allen and George Cosson, and John Nickerson, Jr., and A. B. Leach & Co., intervenors, and hand each of you a copy herewith.
>
> "I do not write any opinion. I see no occasion to express my views as to this statute under the state constitution, although I believe it not to be in conflict with the state constitution. As to the United

States Constitution it seems to me that the entire case is more of an academic question than a practical one. As it seems to me the petitions of intervention as well as the bill of complaint are grounded on the theory that it is desirable to have the opinion of the court in advance rather than to wait for an alleged wrong by reason of some actual transaction that may or may never take place. This I do not believe a court should do.

"Aside from the foregoing I fail to find any burdens but what of like kind have been upheld in many other business transactions, both interstate and wholly within the state. Frauds and rascality in dealing with stocks and bonds are known by all. Whether such can be suppressed is not known. And it may be that honest transactions will be prevented. If so they can and will be remedied. Such in brief are my views.

Yours truly,
(Signed) Smith McPherson, Judge."

A couple of weeks later (January 28th) came a decision in the Michigan case, **Alabama and New Orleans Transportation Co. v. Doyle, 210 Fed. Rep. 173.** If the court had gone no further than the recital of the facts in the particular case and its decision, no harm would have been done, but the court stated that it felt called upon to give the reasons for its decision and in **giving these reasons the Michigan court fell into a fundamental error, to wit: the assumption that the Supreme Court of the United States had overruled the cases of Nathan v. Louisiana and Paul v. Virginia. This error was followed in each of the other cases in which district courts held various Blue Sky Laws to be unconstitutional.**

The reasoning in the Michigan case is based upon the premise that the cases of Nathan v. Louisiana and Paul v. Virginia were both overruled in the Lottery Case. As

a corollary of this the court assumed that bonds and commercial paper (and probably stocks) had by the doctrine of the Lottery Case been held subjects of interstate commerce in **all** that those terms imply.

In discussing Nathan v. Louisiana and Paul v. Virginia the Michigan court said (210 Fed. Rep. 183):

> "**However if either of these cases might otherwise be thought now controlling, we think the opinion in the Lottery Cases (188 U. S. 321) requires the contrary result.** As to stocks some distinction from the Lottery Cases can be drawn because the certificates, in part, represent rights of membership; but we cannot appreciate the force of any consideration whereby it might follow that, although lottery tickets are subjects of interstate commerce, bonds and commercial paper are not * * * They satisfy in every respect the essential definition in the Lottery Cases; indeed, they satisfy the more limited definition contended for in the minority opinion in that case.
>
> But if bonds and commercial paper (and probably stocks) are the subjects of interstate commerce, are interstate dealings in them directly burdened by this law?"
>
> (Blackface ours.)

No mention is made of any one of three cases in which this court had but then recently held that Nathan v. Louisiana and Paul v. Virginia had not been overruled, to wit: **New York v. Reardon, 204 U. S. 152; Ware & Leland v. Mobile Co., 209 U. S. 405; New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495**—the last of which cases had been decided less than three months before.

There was a total failure to appreciate or even take the slightest note of the difference in principal or fact between Nathan v. Louisiana and Paul v. Virginia on the one hand or the Lottery Case and the International Text

Book Case on the other hand. The court considered them as irreconcilable instead of as they are harmonious and compatible. This accounts for the trouble and necessity that the court had in endeavoring to distinguish other cases decided by the Supreme Court of the United States and to show wherein they did not apply to the facts in hand.

A rehearing was then obtained in the Iowa case and the three judges in the case of **Compton v. Allen, 216 Fed. Rep. 537**, following the court in the Michigan case, held that Nathan v. Louisiana and Paul v. Virginia were no longer precedents exhibiting good law. After quoting the Michigan court and with a slight review of the Lottery Cases, the Iowa court said **(216 Fed. Rep. 547)**:

> "Under many decisions from the Supreme Court since that of Nathan v. Louisiana, supra, holding foreign bills of exchange, and Paul v. Virginia, supra, holding insurance policies not subjects of interstate commerce, we have no doubt but that court, when presented with the question, will declare such securities and property rights, negotiable and otherwise, as are sought to be regulated by the act in question are proper subjects of interstate commerce."

In December of the same year came the West Virginia case, **Bracey v. Darst, 218 Fed. Rep. 482**, where by a divided court (Woods, Circuit Judge, dissenting), the West Virginia Blue Sky Law was held unconstitutional, the majority opinion concluding **(218 Fed. Rep. 496)**:

> "The opinions in the Iowa and Michigan cases are so clear, sound and convincing as to not only command our admiration, but lead us to the conclusion that nothing more complete and effective can be added to them."

In no one of these three cases was either the case of New York v. Reardon, 204 U. S. 152; Ware & Leland v. Mobile Co., 209 U. S. 405, or New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495, even cited.

The snow ball of error had not only gained some momentum, but had more than tripled in size.

Nathan v. Louisiana and Paul v. Virginia NOT overruled.

While we shall attempt hereafter to point out the distinction between Nathan v. Louisiana and Paul v. Virginia on the one hand and the Lottery Case and the International Text Book Co. v. Pigg case on the other hand, we desire first to show solely by the language of this court in three different cases recently decided (two of the opinions being written by justices who joined in the majority opinion in the Lottery Case) that the District Court in the original Michigan case erred when it assumed that the Lottery Case had overruled Nathan v. Louisiana and Paul v. Virginia.

The case of **New York v. Reardon, 204 U. S. 152,** was a case wherein one Hatch, a resident of Connecticut, sold in New York to one Maury, also a resident of Connecticut, but doing business in New York, one hundred shares of the stock of the Southern Railway Company, a Virginia corporation, and one hundred shares of the stock of the Chicago, Milwaukee and St. Paul Railroad Company, a Wisconsin corporation, and on the same day and in the same place received payment and delivered the certificates assigned in blank. He made no memorandum of the sale and affixed to no document any stamp

and did not otherwise pay the tax on transfers of stock imposed by the New York laws of 1905, c. 241. He was arrested on complaint, and thereupon petitioned for this writ, alleging that the law was void under the Fourteenth Amendment of the constitution of the United States. Both sides however argued and the court considered the case under the commerce clause of the constitution, Article I, Section 8. Seven of the justices who sat in the Lottery Case also participated in this case. In the course of the opinion by Mr. Justice Holmes it was said **(page 161-162)**:

> "It is said that the property sold was not within the state. The immediate object of sale was the certificate of stock present in New York. That document was more than evidence, it was a constituent of title. No doubt, in a more remote sense, the object was the membership or share which the certificate conferred or made attainable. More remotely still it was an interest in the property of the corporation, which might be in other states than either the corporation or the certificate of stock. But we perceive no relevancy in the analysis. The facts that the property sold is outside of the state and the seller and buyer foreigners are not enough to make a sale commerce with foreign nations or among the several states, and that is all that there is here. **On the general question there should be compared with the drummer cases the decisions on the other side of the line. Nathan v. Louisiana, 8 How. 73;** * * *" (Black face ours).

In the case of **Ware & Leland v. Mobile Co., 209 U. S. 405,** it was held that the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery, and transmitting them to other states, is not interstate commerce so as to be exempt from the state taxation, where, in those cases in which

contracts for purchase for future delivery result in an actual delivery, the property is brought in the state to which the orders are transmitted, and there held for the purchaser, and in those cases in which there is a delivery upon the contract of sale made by the broker, the seller is at liberty to acquire the property in the market where delivery is required or elsewhere. The Lottery Case was one of the cases relied upon by plaintiff in error.

This case was also participated in by seven of the justices who sat in the Lottery Case.

In the course of the opinion by Mr. Justice Day it was said (bottom page 409, top page 410):

> "It is unnecessary to review the former decisions of this court as that has been done in very recent cases such as the Lottery Case (Chamberlain v. Ames, 188 U. S. 321), where it was held that the **transportation** of lottery tickets was interstate commerce and as such subject to regulation by act of Congress." (Black face ours.)

After reviewing that case and the Telegraph Cases, the court continued (page 411):

> "While the principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate commerce.
>
> **As in the cases involving insurance policies, it has been held that issuing them in one state and sending them to another, to be there delivered to the insured upon payment of the premium, is not**

the transaction of interstate commerce. Paul v. Virginia, 8 Wall, 168." (Black face ours.)

The court then proceeded to quote from the opinion of Mr. Justice Field in Paul v. Virginia.

The case of **New York Life Insurance Co. v. Deer Lodge Co., 231 U. S. 495,** decided December 15, 1913, involved the question of whether the plaintiff in error was engaged in interstate commerce in issuing policies of insurance which were subject to sale, transfer and assignment and which might be and were used for collateral security and other commercial purposes, and which were valuable for such purpose and for other general purposes of trade and commerce. Throughout the opinion by Mr. Justice McKenna the cases of Paul v. Virginia and Nathan v. Louisiana (particularly the former) are cited, discussed and quoted from extensively.

In the course of the opinion it was said (page 510):

> **"It is contended that Paul v. Virginia and the cases which follow it, must be limited, as it is contended 'the facts therein did limit them to intrastate, not interstate, contracts' and that if they be not so limited, the Lottery Case, 188 U. S. 321, and The International Text Book Co. v. Pigg, 217 U. S. 91, cannot stand.**" (Black face ours.)
>
> The basis of this contention necessarily is the insistence that the contracts in Paul v. Virginia and the succeeding cases were intrastate contracts, while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that contracts of insurance are not commerce at all, neither state nor interstate. This is the obstacle to the contention of the insurance company. The company realizes it to be an obstacle and is attempting to remove it by detailing the manner of conducting its

business as demonstrating that its policies are interstate contracts. We have replied to the attempt and shown that its manner of business has no such effect. It follows necessarily, therefore, that neither the Lottery Case nor the Pigg Case impugns **the authority or the application** of the cases cited. They, the Lottery Case and the Pigg Case, were concerned with transactions which involved the transportation of property and were not merely personal contracts."

The Lottery Case on one hand and Nathan v. Louisiana and Paul v. Virginia on the other hand, distinguished.

In the opening paragraphs of the opinion in the Lottery Case, 188 U. S. 321- 344, Mr. Justice Harlan said:

> "The appellant insists that the **carrying** of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state, although such tickets may be contained in a box or package, does not constitute and cannot by any act of congress be legally made to constitute, **commerce** among the states within the meaning of the clause of the constitution of the United States that congress shall have full power 'to regulate commerce with foreign nations, and among several states, and with the Indian tribes'; consequently, that congress cannot make it an offense to cause such packages to be carried from one state to another.
>
> The government insists that express companies when engaged, for hire, in the business of transportation from one state to another, are instrumentalities of commerce among the states; that the **carrying** of lottery tickets from one state to another is commerce which congress may regulate; * * * "

(Italics ours.)

A little further on it is said:

> "Does not the **carrying** from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified, also constitute commerce among the states?" (Black face ours.)

Throughout the opinion the discussion is solely that of **transportation**.

In **Nathan v. Louisiana, 8 How. 73,** it was held that a broker dealing in foreign bills of exchange was not engaged in interstate commerce. But while the broker so dealing in bills of exchange would not be carrying on commerce, what would be said of a messenger engaged in the business of carrying and delivering bills of exchange from a point in one state to a point in another? Unquestionably he would be engaged in interstate commerce. **All** transportation is commerce.

In **Paul v. Virginia** it was held that the business of making contracts of insurance was not commerce, so that the act of entering into such a contract as between residents of different states, and solicitation of such contracts involving the delivery of insurance policies in the United States mails, from one state to another, was not interstate commerce.

Nevertheless, it is submitted that if an express company had been found engaged in the business of carrying the paper writings constituting the written evidence of insurance contracts, from a point in one state to a point in another, such a transaction on its part would constitute interstate commerce. The interstate transportation of anything that is tangible enough to be transported is interstate commerce.

These distinctions explain the Lottery Case, 188 U. S. 321, which, unless they are made, is squarely irreconcilable in principle with Nathan v. Louisiana and Paul v. Virginia. It is there held that lottery tickets are subjects of interstate commerce. Indeed, Mr. Justice Harlan, announcing the opinion of the majority of the court, uses practically these identical words. Strangely enough, he does not even refer in his opinion to Nathan v. Louisiana and Paul v. Virginia. How is this seeming oversight to be explained, for the dissenting justices, of whom there were four and whose views were expressed by Mr. Chief Justice Fuller, were not slow to cite the insurance cases and the negotiable paper cases, in opposing the majority view.

So, a distinction is necessary in order to reconcile the principle of the Lottery Case with the two previous cases referred to, and in order to explain the utter failure of Mr. Justice Harlan even to refer to those two cases. Such a distinction exists when the facts of the Lottery Case are examined. There was therein involved a question as to the constitutionality of an act of congress entitled "An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States."

The section upon which the particular indictments, that had led to the convictions brought under review, were based provided that:

> "Any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper,

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certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert, or similar enterprise * * * or shall cause any advertisement of such lottery * * * to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable * * * ."

It will be seen that the kind of acts, at which the legislation was aimed, are all species of **transportation**—actual carriage. And the classes of persons, at whom the act is aimed, all belong to the general group of carriers operating between foreign countries and the United States, or across the borders of the several states.

Let it be observed that congress did not attempt to prohibit the sale within a state of lottery tickets that in order to fulfill the contract of sale would have to be transported in interstate commerce; in other words, the legislation did not prohibit the making of contracts involving the interstate transportation of lottery tickets, but satisfied itself with prohibiting the transportation itself.

Therefore, the question in the Lottery Case was like the question that would have existed in the Nathan Case, if that case had concerned not the sale of foreign exchange, but the actual transportation or carriage of such bills of exchange from one state to another, and like the question which would have been presented in the Paul Case, if the facts therein had related to the interstate transportation of insurance policies as pieces of paper.

Let the cases cited by Mr. Justice Harlan, in support of the majority view that the act was within the powers of congress, be examined.

First, there is Gibbons v. Ogden. This case merely holds that interstate navigation is interstate commerce.

The passenger cases were next cited (after observing that Gibbons v. Ogden had been reaffirmed in Brown v. Maryland). That was a case in which the carriage of passengers, i. e. their actual transportation, was held to be commerce.

Woodruff v. Parham was cited as showing by way of comment on the Almy Case that a tax on the bill of lading representing interstate commerce was a burden on interstate commerce, because it is indirectly imposed "upon the transportation of goods from one state to another." It is because the bill of lading is a symbol of transportation and necessarily connected with the idea of carriage, that it is referred to by Mr. Justice Harlan.

So also with the other cases which may be tabulated, as follows:

Henderson v. Mayer, passenger navigation.
United States v. Holliday, navigation.
Pensacola Telegraph Co. v. Western Union (in which the telegraph was likened to the railroad, the steamboat and the stage coach, as an agency of transportation.
Mobile v. Kimball, navigation.
Gloucester Ferry Co. v. Pennsylvania, navigation.

And so on throughout all the cases.

None of the cases cited, with the exception of Brown v. Maryland, which was merely referred to as reaffirming Gibbons v. Ogden in its general aspect and Woodruff v. Parham, which was cited solely to show the com-

ment on the Almy Case, in any way involve that aspect of commerce which consists of the **sale** of a commodity which, in order to fulfill the contract, must be brought from another state.

On the other hand, the dissenting judges cite nothing but cases of this last named character, among others Robbins v. Shelby County Taxing District, 120 U. S. 489, which is the leading case on the point that the activities of a commercial traveler, or "drummer," in negotiating for sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.

It is submitted that the distinction between the regulation of transportation activities as such, and the regulation of internal sales because they involve some transportation, is a valid one.

What, then, is the established rule of the Supreme Court of the United States, in dealing with questions of the second type, which is presented by that involved in the case at bar?

It is submitted that here the transaction is not regarded as interstate commerce within the purview of the federal constitution, unless the contract negotiated in a particular state necessarily involves and calls for, as an essential element thereof, the transportation of a commodity from another state to the state wherein the negotiation is had; and that within the purview of this principle, intangible property, however valuable, however capable of being reached for purposes of taxation and judicial process, and however regarded for purpose of the administration of estates, is not a commodity; and that mere paper writings, constituting written mem-

oranda which in turn make up the evidence of the intangible right which is the real subject of the contract, are not commodities.

So that, though persons may negotiate within a state for the assignment, sale or transfer of an incorporeal or intangible property right, the written evidence of which exists at the time of the negotiation in tangible form in another state, and will most likely be delivered to the assignee or vendee in the state of negotiation, the sale itself or the assignment does not constitute interstate commerce, and all such transactions are subject to the police power of the state, which may be exerted without trespassing upon the exclusive power of congress to regulate interstate commerce.

This theory finds support in the cases from Nathan v. Louisiana and Paul v. Virginia down to New York (Hatch) v. Reardon, Ware & Leland v. Mobile County, New York Life Ins. Co. v. Deer Lodge County, German Alliance Insurance Co. v. Lewis and Rast v. Van Deman & Lewis.

On the other hand, no case decided by the Supreme Court of the United States will be found opposed to it. That the Lottery Case is not opposed to it is, it is believed, demonstrated by what has already been said respecting that case. However, there is a passage in the opinion of Mr. Justice Harlan which directly supports the principle contended for. It is found at page 357 of the official report and is as follows:

> "* * * Congress * * * does not assume (in the act the provisions of which have been quoted) to interfere with traffic or commerce in lottery tickets, carried on exclusively within the limits of any state, but has in view only commerce of that kind among

> the several states. It has not assumed to interfere with the purely internal affairs of any state and has only legislated in respect of the matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid **all sales of lottery tickets within its limits,** so congress * * * may prohibit the **carrying** of lottery tickets from one state to another. * * *." (Black face ours.)

It will not be assumed, we take it, that Mr. Justice Harlan was careless in the use of language in this passage, when he said, in the course of his opinion, **that a state may forbid all sales of lottery tickets within its limits.** He must be understood to have meant precisely that. He does not qualify his language by saying that the power of the state to forbid sales of lottery tickets within its limits is limited to the prohibition of such sales as do not involve the transportation of lottery tickets from another state to a point within its limits, in order to fulfill the contract of sale. On the contrary he says **all sales**; and in the same sentence he distinguishes the power of the state to act with respect to the **sales,** from the power of congress to act with respect to the **carrying.**

Each of the cases in district courts where blue sky statutes have been declared invalid on account of being a burden on interstate commerce is based upon the Lottery Case. Some of them go on to show that shares of stock are personal property, separate and apart from the assets, the right to share in which on ultimate distribution they represent; that they have an intrinsic value of their own; that they are subject to taxation and to attachment and execution, etc. But all this is beside the mark.

Bills of exchange have the same characteristics. So also have insurance policies in certain respects, and these federal district courts are frankly puzzled at the apparent conflict between Nathan v. Louisiana and Paul v. Virginia on the one hand, and the Lottery Case on the other hand. Merely because the Lottery Case is later in point of time, these courts have erroneously, it is believed, assumed that in effect it limits or overrules these previous cases, overlooking that Nathan v. Louisiana and Paul v. Virginia have been reaffirmed since the Lottery Case was decided. See 204 U. S. 152; 209 U. S. 405; 231 U. S. 495. The error in which the courts have fallen is due to the fact that they have overlooked the distinction above pointed out. For that matter, let it be supposed that A has a claim against B, for the payment of money, which is not witnessed by any written instrument which passes current or has an intrinsic value of its own, as for example a judgment of a foreign court. A and C in Ohio make a contract whereby A sells and assigns to C his judgment claim against B, expressly promising that when he returns to his home, in the state wherein the judgment was rendered, he will send a written memorandum of the agreement to C. Is this commerce merely because A's claim is valuable, so that A could be reached by judicial process if he were a resident of the state where the negotiation took place and would have to pay taxes upon the claim as a credit in that state, or for any other reason going to the mere value of the subject matter of the contract?

On the other hand, is such a transaction any the less commercial because it does not involve the carrying or transportation of something as tangible as a slip of paper which may pass current, as a bond?

In short, the Lottery Case is the sole foundation of all these district court decisions on the interstate commerce question. When that case is correctly understood and due force is given to the decisions in Nathan v. Louisiana and Paul v. Virginia, the foundation for the theory adopted by the district courts is swept away.

In this same connection it is to be observed that the International Text Book v. Pigg case, also relied upon by some of the courts in perhaps a little different connection, does not militate against the theory above outlined; for the business transacted by the International Text Book Company in the state of Kansas, as shown by the record in that case, involved the making of contracts in that state, calling for the **delivery** there, from a point in Pennsylvania, of tangible property, viz.: books, which are in every sense "**commodities.**"

Blue Sky Laws Held Valid in State Courts.

But three state Supreme Courts have passed upon blue sky laws, to wit: Arkansas, Florida and North Carolina, in each of which cases the legislation of the state was upheld. Actions to test the blue sky laws are pending also in the Supreme Courts of Ohio and Michigan, the cases in Ohio being held on account of the pendency of the instant cases in this court.

The Arkansas law was upheld on November 24, 1913, in the case of the **Mechanics' Building & Loan Association v. Coffman, 110 Ark. 269** (some of the court in this case dissenting, solely however on the method of the passage of the bill by the legislature).

The Florida law was upheld on July 8, 1914, in the case of **Ex Parte Taylor, 68 Fla. 61.**

The North Carolina law was upheld on May 3, 1916, in the case of **State v. Agey, 88 S. E. 726,** advance sheet No. 9.

Other Federal District Court Cases.

Other blue sky cases had been brought in other Federal District Courts during the year 1914.

In an attempt to knock out the Oregon Blue Sky Law the court (JJ. Gilbert, Wolverton and Bean) held, in the case of **National Mercantile Co. v. Watson, 215 Fed. Rep. 929,** that the plaintiff, being a foreign corporation not qualified to do business in the state of Oregon, had no standing in court to complain of the laws of the state.

On October 15, 1914, the Federal District Court upheld the Arkansas Blue Sky Law in the case of **Standard Home Co. v. Davis, 217 Fed. Rep. 904.** This decision was subsequent to the decision in the Michigan and Iowa cases, but prior to the decision in the West Virginia case. In the West Virginia case the court had said (218 Fed. Rep. 480):

> "So far as we can learn the Arkansas act has not been passed upon by either the court of last resort of the state or by the United States courts of the state."

Not only had the Federal District Court passed upon the Arkansas law, but the Supreme Court of the state more than a year before had held the Arkansas Blue Sky Law to be constitutional (110 Ark. 269). Borrowing from the syllabus as prepared by the Reporter, the

Arkansas Federal District Court in the case of **Standard Home Co. v. Davis,** held (217 Fed. Rep. 904):

> "An investment company, which sells contracts requiring the purchaser to make monthly payments, which are invested by the company and, after a certain number of successive payments have been made, returned, with the profits earned, not exceeding a specified sum, and which also makes loans to its contract holders for the purchase of homes, taking mortgages on the property purchased, is not engaged in commerce, within the meaning of the commerce clause of the constitution (Article 1, Section 8); and the fact that its business is interstate does not render a state statute regulating its operations within the state unconstitutional as in violation of such clause.
>
> "Act Ark. March 28, 1913 (Laws 1913, p. 904), providing for the regulation of investment companies, held not in violation of the federal or state constitutions, in so far as it affected the rights of a foreign company, nor void because of the unreasonableness of its requirements, or on the ground it is not within the police power of the state.
>
> "While freedom of contract is a right inherent in every person under the constitution of the United States, it is not an absolute, but a qualified, right, free from arbitrary restraint, but subject to reasonable regulation.
>
> "The courts cannot review the economics or facts on which the legislature of a state bases its conclusions that an existing evil should be remedied by an exercise of the police power."

Many objections were urged against the law. The Michigan and Iowa cases were cited but the court held that, inasmuch as plaintiff's bill did not show it to be engaged in interstate commerce, therefore those cases were not in point (the court having opened his opinion with the statement that "it is a well-settled rule of law

that a statute will not be declared unconstitutional at the instance of one not affected by it," which doctrine applied to several objections raised by the plaintiff).

That the Arkansas Federal Court did not agree with the Michigan and Iowa courts in holding that Paul v. Virginia had been overruled is rather clearly shown in the next paragraph after the court disposes of the Michigan and Iowa cases as precedents **(217 Fed. Rep. 915)**:

> "Is the plaintiff engaged in commerce? It offers nothing for sale, but is purely an investment company. It undertakes to invest any moneys intrusted to it, and the profits derived from the investment, after paying the expenses of the plaintiff corporation, are, after 80 monthly payments have been made, to be paid to the party who made these payments. But these profits are not to exceed a certain sum mentioned in the contract. This is no more commerce than insurance, and that insurance is not commerce, within the meaning of the commerce clause of the constitution, is no longer an open question. The latest case on that subject is New York Life Insurance Co. v. Deer Lodge County, 231 U. S. 495, where the former decisions of the court, holding that insurance is not commerce, were reaffirmed. Nor are loans of money made to clients for the purpose of enabling them to acquire homes commerce, within the meaning of the commerce clause of the constitution. Nelms v. Mortgage Co., 92 Ala. 157, Southern Building & Loan Association v. Norman, 98 Ky. 294. Lending money is neither a sale nor a **purchase."**

Without specifically alluding to the reasoning in the Michigan case (which the court had before it) the court proceeds to severely puncture much of that reasoning.

In the Michigan case the court quoted the broad language of the opinion in the case of Allgeyer v. Louisiana,

165 U. S. 578-589, overlooking the limitation placed upon it by the opinion in the case of C. B. & Q. R. Co. v. McGuire, 219 U. S. 549-566, and held that the act in question did not come within the police power of the state, the court in the **Michigan case** saying **(210 Fed. Rep. 179)**:

> "The first vital question then must be whether the provisions of the statute have 'real or substantial relation to the public welfare.' This form of words is capable of a construction broader than may ultimately be approved (Noble Bank v. Haskell, 219 U. S. 104-111). But we take it as intended to be definitive of the police power and so the extent of that power is the real question. It would be profitless to undertake any review of the decisions on this subject, or to try to adopt or formulate any comprehensive and accurate definition of this phrase. It is enough, now, to remember that the prohibition in question has to do with transactions predominately private, and not with those which are affected by a public interest, which arise from public grant or which exist by public sufferance. This statute does not deal with common carriers, grain elevators, or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant peddlers, and the like. The issuing of commercial paper, stocks or bonds by a private company to get money for its own business no one can suppose is a public or quasi-public enterprise; the business of buying and selling stocks and bonds and other securities is no more 'affected by a public interest' than is the business of buying and selling groceries."

Of course, when the entire opinion in the first Michigan case is carefully read and we take note of the opening statement of the opinion, together with the all-embracing nature of the first Michigan law, it hardly can be claimed that that case is authority for saying that the

sale of corporate stocks, bonds, etc., is **entirely beyond** the **scope of the state's police power.**

The court in the **Iowa case** very summarily disposed of that question by saying **(216 Fed. Rep. 545)**:

> "Concerning the power of the state to regulate or control by its laws the operations and dealings of 'investment companies' as that term is usually employed and understood, whether such companies are created under the laws of this state, or are created under the laws of foreign states, who make application for the privilege of engaging in business within this state, little of doubt arises and nothing need be said."

Yet in the **West Virginia case** the majority opinion in following the Iowa and Michigan opinions which they said commanded their admiration, the court said **(218 Fed. Rep. 495)**:

> "As regards corporations even it may truthfully be said that comity between the states and common sense business considerations, have practically given them unlimited permission to do business throughout the country; but this freedom should certainly not be abused to the extent of allowing them to defraud and cheat, and it may well be the jealous care and concern of the state legislatures that they do not do so. And in one sense we think this evil has been fully provided for. So far as we know the states uniformly have criminal statutes against the procurement of money or things of value under misrepresentation, false pretenses and fraud, and the civil right of the victim of such to recover back the money or property so secured is universally upheld and enforced. In another sense some of the states may have failed to meet their full moral obligation to the citizenship of the whole country, in that they have indiscriminately granted charters to corporations without safeguarding its citizenship and those of sister states from unsound, fraudulent, 'wild **cat' and 'fly in the night'** organizations, forgetting,

> perhaps, that homely maxim that 'an ounce of prevention is better than a pound of cure.' The wisdom of making these provisions in advance and as a part of the conditions upon which the franchise is granted and by the state granting it, is apparent, for it cannot be gainsaid that if all forty-eight states of the Union attempt to enforce these after-incorporation provisions set forth in these blue sky laws, with all their fines, penalties and fee exactions, against all legitimate and sound business corporations, because some states have recklessly chartered others that were unsound and conceived to cheat and defraud, business conditions throughout the country will be greatly affected and injured."

In other words the court itself reserves the right to point out the "ounce of prevention" that may be described, claiming the fault to be with some of the forty-eight states of the Union. The court leaves us to the inference that the remedy is to go after the states with loose incorporation laws, but the court fails to point out how this may be done effectively. In this respect, as in the **Michigan case**, wherein the latter court said **(210 Fed. Rep. 179)**:

> "We cannot shut our eyes to the fact which all men know, that as compared with the total dealings in securities, covered and contingently prohibited by this act, those which may fairly be suspected of being fraudulent in character are of a very trifling proportion; and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business and professional occupations."

Both of these courts have mistaken their function, failing to distinguish, as has often been pointed out by this court, that while it is the province of courts to inquire into the **power** of the legislature to pass an act,

the **policy** involved in such laws is for the legislature. As will be pointed out later in this argument, the court below in the instant cases made the fundamental error, in addition to following the Michigan court on the interstate commerce feature, of assuming that it was beyond the police power of the state to pass such legislation as the various blue sky laws.

Witness, too, how doctrines sometimes grow. The **Michigan case** had expressed some doubt about corporate stocks being subjects of interstate commerce, saying (p. 183):

> "As to stocks, some distinctions from the lottery cases can be drawn because the certificates, in part, represent rights of membership. * * * If bonds and commercial paper (and **probably** stocks) are the subjects of interstate commerce. * * *"

In the Iowa and West Virginia cases that doubt has disappeared **and the Michigan opinion was given as the authority for the absolute statement.** And in the instant cases the court below in its opinion (Record, p. 35) said:

> "Utterances emanating from the Supreme Court and express rulings by lower federal courts establish beyond all reasonable controversy that stocks and bonds, securities whose disposition is subject to the provisions of the act, are articles of legitimate interstate commerce."

After the decisions in the original Michigan and Iowa cases the various states, including Ohio, passed new laws doing away with some of the objectionable features contained in the old law. The Ohio law, as has been pointed out elsewhere, was especially corrected to meet the Michigan case. The National Association of

Attorneys General appointed a committee which drafted a blue sky law calculated to stand the test of attacks in the Federal courts. The act as recommended by the attorneys general, with slight modifications to meet local conditions, was enacted in a number of states, among them Michigan and South Dakota.

While the instant cases were pending the case of **Sioux Falls Stock Yard Company v. Caldwell** was decided by the District Court in South Dakota and the case of **Halsey & Co., v. Merrick, 228 Fed. Rep. 805,** was decided by the District Court for the Eastern Division of Michigan—the same judges sitting as in the first Michigan case.

In the South Dakota case a brief oral argument was had one afternoon and the following morning the court allowed an interlocutory injunction. No opinion was rendered at the time, the basis of the action as understood being the Michigan, Iowa and West Virginia Federal Court **decisions.**

In the course of its opinion in the **latest Michigan** case the court said, **(228 Fed. Rep. 806)**:

> "It is not important to go over the same ground as before. Our conclusions then announced have been more or less completely approved—in the Eighth Circuit, by Judges Smith, McPherson and Pollock (Compton v. Allen, 216 Fed. 537); in the Fourth, by Judges Pritchard and Dayton, Judge Woods dissenting, but not on these points (Bracey v. Darst, 218 Fed. 482); and in the Eighth again, by Judges Sanborn, T. C. Munger, and Elliott (Sioux Falls Co. v. Caldwell, Attorney General of South Dakota, Nov. 18, 1915, without written opinion)."

The court then without any attempt to review the question proceeded to hold the new Michigan law a

burden on interstate commerce, saying in the next paragraph (228 Fed. Rep. 806):

> "The only question now open is whether the differences between the laws of 1913 and 1915 justify any different result as to the latter. We think not, because we find no substantial changes in those respects which were held to be fatal. Some minor details have been corrected, but the new law, like the old, impresses upon interstate commerce a burden which is direct and which is beyond the limits of the police power."

Thus it was that the Michigan case decided on the false premise than Nathan v. Louisiana and Paul v. Virginia had been overruled by the Lottery Case (which were considered irreconcilable) became the precedent for the decision in the Iowa case, the West Virginia case, the South Dakota case, and the second Michigan case, the court in the last Michigan case closing the circle by holding its own reasoning followed by the other three courts as conclusive.

It is to be noted also that by the time the court decided the second Michigan case it had come to the conclusion that such regulations as are made by the blue sky laws are beyond the police power of the state.

C. THE VALIDITY OF THE OHIO BLUE SKY LAW.

1. The Reasoning of the Court Below.

(a) While the court below followed the reasoning in the original Michigan case, it went further, and in addition to assuming that Nathan v. Louisiana and Paul v. Virginia were overruled by the Lottery and Pigg Cases, made a much more serious mistake which we shall discuss first.

The court below fell into one great fundamental error and this attitude assumed by the court below undoubtedly influenced their viewpoint on other features of the case. The court below proceeded upon the premise that it was beyond the power of the legislature to regulate the sale of corporate stock.

In the course of the opinion the **court below** said (record p. 39):

> "The act must be further tested by its effect upon the citizen's right to pursue a lawful calling."

Then after a discussion of this proposition, concluded (Record p. 40):

> "Legitimate commercial transactions, such as the disposal of securities of the kind above mentioned, cannot be regulated by legislative enactment."

The court below in their reasoning said (Record p. 39):

> "But, however viewed, the act transcends the legitimate exercise of the police power and violates the due process clause of the constitution. There is a fundamental distinction between what Mr. Justice Bradley termed, in Butchers Union Co. v. Crescent City Co., 111 U. S. 746, 763, the ordinary occupations and pursuits of life, forming the large mass of industrial avocations which are and ought to be free

and open to all, subject only to such general regulations, applying equally to all, as the general good may demand, and the kinds of business and transactions which are affected by a public interest or arise from public grant or exist by public sufferance. Of this latter class are the liquor traffic, grain elevators, innkeepers, warehouses, itinerant peddlers, insurance, motion picture shows, concerns exercising public franchises, and the like, all of which it is competent for the state law-making power to regulate and within proper bounds subject to executive license and control, as the interests of society may require. To the former class, with which alone we are now dealing, belongs the right in good faith to buy and sell securities and to fix their price by agreement, either in individual transactions or in the course of repeated and successive transactions of a similar character, a right which, when so exercised, is both property and liberty and which cannot be made subject to either executive grant or denial."

The court based this finding upon the language of Allgeyer v. Louisiana, 165 U. S. 578-589, overlooking the limitation on this same language of the Allgeyer case made by this court in the opinion in the Lottery Case, as well as in the opinion in the case of C. B. & Q. R. Co. v. McGuire, 219 U. S. 567, which will be referred to more at length presently.

The attention of the court below was called to the case of **German Alliance Insurance Co. v. Lewis, 233 U. S. 389,** but to no avail.

In this last named case this court in the opinion by Mr. Justice McKenna said (page 407):

"It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property, and

whether the public has a legal right to the use which cannot be denied;' or, as we have said, quoting counsel, 'Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.' Cases are cited which, it must be admitted, support the contention. **The distinction is artificial.** It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicity so contends, **urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle.** (Noble State Bank v. Haskell, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated." (Black face ours).

On page 409 the court said:

"Munn v. Illinois was approved in many state decisions, but it was brought to the review of this court in Budd v. New York, 143 U. S. 517, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated, and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. **The consideration urged did not prevail: Against them the court opposed the over-existing police power in government and its necessary exercise for the public good,** and declared its entire accomodation to the limitations of the constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous compre-

hension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities."

In reviewing Brass v. North Dakota, 153 U. S. 391, the court continued (page 411):

> "The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may arise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews, in the Budd Case (117 N. Y. 27) that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected, cannot be supported. 'The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation."

The court below disregarded the warning of Mr. Justice Holmes in the case of **Noble State Bank v. Haskell, 219 U. S. 104-110,** wherein he said:

> "In answering that question (due process of law, liberty of contract and the other provisions of the 14th amendment) we must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic intrepretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have very few scientifically certain criteria of legislation and as it often is difficult to mark the line where what is called the police power of the states is limited by

the constitution of the United States, judges should be slow to read into the latter **a nolumus mutare** as against the lawmaking power."

The court below (Record p. 40) quoted from the Allgeyer case as follows:

> "The right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or a vocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

and said:

> "If an issuer or owner of or dealer in securities issued in good faith and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal or of offering them for disposal, he is deprived not only of his property, within the meaning of the constitution, by taking from him one of the incidents of ownership (City of Chicago v. Netcher, 183 Ill., 104, 110), but also of his liberty, as appears from Mr. Justice Matthews' saying in Yickwo v. Hopkins, 118 U. S. 356, 370, that: 'The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' "

We cannot see the application of the case of **Yick Wo v. Hopkins, 118 U. S. 370,** to the Ohio Blue Sky Law. In that case this court found that a San Francisco ordinance aimed at chinamen **only** was invalid, the court saying (page 373):

> "* * * and the facts shown establish an administration directed so exclusively against a partic-

> ular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted they were applied by the public authorities charged with their administration and those representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of the equal protection of the laws. * * * "

Certainly this case can by no stretch of imagination be made an authority for declaring the Ohio Blue Sky Law invalid.

We respectfully submit that in addition to this being beside the mark the court has overlooked the very important limitation placed upon the same language in the Allgeyer Case in the majority opinion by Mr. Justice Harlan in the **Lottery Case,** wherein it was said, after quoting the language above referred to:

> "But surely it will not be said to be a part of anyone's liberty as recognized by the supreme law of the land that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals."

More particularly did the court below overlook the limitation placed upon that same language of the Allgeyer Case in the **C. B. & Q. R. Co. v. McGuire, 219 U. S. 567,** wherein it was said, after reciting the same language of the Allgeyer Case as is cited by the court below:

> "But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists in the making of contracts, or deny to government the power to pro-

> vide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community. Cowley v. Christensen, 137 U. S. 89; Jacobsen v. Mass., 197 U. S. 11. **'It is within the undoubted power of government to restrain some individuals from all contracts as well as all individuals from some contracts;** and indeed it may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by the government in no manner conflicts with the proposition that, generally speaking, every citizen has a right to freely contract for the price of his labor, services or property.' Frisbie v. U. S. 157 U. S. 165." (Black face ours.)

After citing various instances and cases wherein the legislature might limit the right of contract Mr. Justice Hughes proceeded to say (page 569):

> "The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is reasonable relation to an object within the governmental authority the exercise of legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of **power** is not to be confused with the scope of the legislative considerations in dealing with the matter of **policy.** * * *
>
> The principle was thus stated in McLean v. Arkansas, supra, pp. 547-548:
>
> 'The legislature being familiar with local conditions is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views on public policy or that judges may hold views inconsistent with the propriety of the legislation in question affords no ground for judicial interference unless the act in question is unmistakably and palpably in excess of

legislative power. If there existed a condition of **affairs concerning which the legislature of the state,** exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass a law, it must be sustained. If such action was an arbitrary interference with the right to protect or carry on business and having no just relationship to the protection of the public within the scope of the legislative power, the act must fail.' "

In the case of **Bacon v. Walker, 204 U. S. 311-317,** Mr. Justice McKenna said:

> "These cases make it unnecessary to consider the arguments of counsel based upon what they admit to be the limits of the police power of the state and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in C. B. & Q. R. Co. v. Illinois, 200 U. S., 561. **In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power we said embraces regulations designed to promote the public convenience or general prosperity,** as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion of whether the sheep industry is legitimate, and not offensive." (Black face ours.)

In the case of **Schmidinger v. Chicago, 226 U. S. 578-587,** Mr. Justice Day said:

> "The right of state legislatures or municipalities acting under state authority to regulate trades and callings in the exercise of the police power is too well settled to require any extended discussion. In Gundling v. Chicago, 177 U. S. 183, the doctrine was stated by this court as follows:
>
> 'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country and what such regu-

> lations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine and their determination comes within the proper exercise of the police power by the state unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass and they form no subject for federal interference.' "

In the case of **Otis v. Parker, 187 U. S. 606,** Mr. Justice Holmes said, at page 609:

> "Even if the provisions before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere. * * * "

The fact that the people of Ohio have a deep-seated conviction on the subject of Blue Sky legislation is very clearly shown, not only in the enactment of the law itself, but in the adoption in 1912 of an amendment to the constitution of Ohio whereby there was added to **Section 2 of Article XIII of the constitution of Ohio** the following:

> "Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be

prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual."

The Ohio Blue Sky law was passed by the first session of the legislature that met after the adoption of the foregoing amendment.

The deep-seated conviction of the people of the state of Ohio is further shown by the fact that immediately after a federal district court had declared the Michigan Blue Sky law invalid the governor of Ohio sent a special message to the legislature of Ohio, then in extraordinary session, as follows:

"To the General Assembly:

There seems to be a well-organized effort in this country to break down the so-called blue sky laws which have been passed under the police powers of the states for the purpose of protecting investors against fraudulent enterprises. An attack was made on the Iowa law, but the court held it to be constitutional. In Michigan, however, the federal court holds that the law is an unjustifiable exercise of the police powers of the state.

The Blue Sky Law adopted in Ohio has justified the principle suggested and vitalized by the Constitutional Convention.

The most careful investigation has been made of the provisions of the law and the trend of judicial logic in the trial of the cases in different parts of the country, and while there is common agreement in the thought that the state has the right, through its police powers, to protect its people against the exploitation of projects fraudulent in purpose and nature; still we must at all times be reminded that our legislation must assume such form as will keep it consistent with the federal provisions regulating interstate commerce; in short, we can afford to change the form of the Ohio law if it is obviously necessary

to retain the substance and preserve the principle involved.

Notwithstanding the Michigan decision was rendered but a few days ago, the opinion has been fully digested, and a bill has been drawn, through the combined counsel of the attorney general, commissioner of insurance and superintendent of banks.

It is my recommendation that the language of the law be rendered less ambiguous, that the fees charged be sufficient to meet the cost of the service, that the restrictions be so modified as to provide against constitutional infirmities, and that the commissioner be given the power, in proper instances, to grant temporary permits during the pendency of applications, so that legitimate business may not be hampered.

In the interest of the public service, I recommend action along these lines by the Assembly.

(Signed) James M. Cox,
Governor."

The legislature immediately adopted the amendment as prepared.

The action of the state of Ohio in amending its constitution so as to render unquestioned the power of the state to pass such legislation and the enactment of the legislation by the state of Ohio, as well as by more than twenty other states of the Union, renders particularly apt the language in the opinion in the case of **German Alliance Insurance Co. v. Lewis, 233 U. S. 389-412,** wherein, after saying:

> "In other words, the state has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.
>
> Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation."

Mr. Justice McKenna, speaking for this court, said:

> "A conception so general cannot be without cause.. The universal sense of the people cannot be accidental; its persistence saves it from the charge of inconsiderate impulse; * * *"

In the case of **Noble State Bank v. Haskell, 219 U. S. 104-111,** Mr. Justice Holmes said of the police power of the state:

> "It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The large number of proposals introduced in the Ohio constitutional convention of 1912, the fact that the constitutional convention adopted two of them, which, after being combined by the committee on phraseology, was adopted by a majority of 88,000 votes by the people of Ohio certainly shows the attitude of the people of this state.

The **court below** in its opinion made the following observation about the foregoing Ohio constitutional amendment:

> "The consideration then of the present statute cannot be aided upon any theory that Section 2 of Article XIII as amended vests in the state legislature any greater power than it possessed under the old section and article." (Record Case No. 438, p. 44.)

In the latest expression of this court upon this subject the principles laid down in the foregoing cases in this court were reiterated in the case of **Rast v. Van Deman,**

decided March 6, 1916, 240 U. S. 342, and in summing up Mr. Justice McKenna in the course of the opinion says:

> "Other cases might be cited, and, it may be, of more pertinent application which from their number and instances, would seem to have uttered the last necessary word upon the power of the legislature to regulate conduct and contracts, and, in the exercise of the power to classify objects, upon its conception of the public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary."

Property Affected With a Public Interest.

The court below laid stress on the doctrine of property or business "affected with a public interest" as being the only property or business subject to regulation by the legislature (Record page 39).

As the phrase "property affected with a public interest" originated in the manuscript attributed to Lord Hale it may not be out of place to briefly refer to both its authenticity and its application.

Approximately a century after the death of Lord Hale, Francis Hargrave (in 1786) announced the publication of a manuscript, admittedly not in the handwriting of Lord Hale, but claimed to be a fair copy by some unknown "transcriber" of Lord Hale's manuscript, under the titles of (Part 1) De Jure Maris et Brachiorum ejusdem, (Part 2) De Portibus Maris, (Part 3) Concerning the customs of goods imported and exported.

In Part 2, under the title De Portibus Maris, in discussing the right to regulate the charges made by public wharves to which all persons must come to lade and unlade goods licensed under the statute of 1 El., Cap. II, or because no other wharf in that port, the author says that

the wharf owner may not take arbitrary and excessive rates "for now the wharf and crane and other conveniences are affected with a public interest and they cease to be **juris privati** only." (Hargrave Law Tracts, page 77.)

Without raising any question as to whether a Fitzgerald had found another Omar or whether a Shakespeare had rewritten some of the stories of Bocaccio, suffice it to say, like in the cases referred to where the process had pleased and charmed and where no harm was done, so with De Portibus Maris. Whether Hargrave's modesty had conjured up a manuscript of a lord chief justice of an earlier century or whether though the manuscript be real it had been translated into the language of Hargrave matters not, for therein the law is well stated and the courts of today, looking for a precedent to justify what everyone knows may be done, may without harm quote De Portibus Maris and at the same time lend to their opinions the charm of research and erudition.

But we do protest against the use of that pleasing and well sounding phrase "property affected with a public interest" as a precedent by which it is sought to bar the state from protecting its citizens generally from the fraud and chicanery of some others of its own citizens or the citizens of another state—a use entirely foreign to the purpose of the creation of the phrase. Nowhere in De Portibus Maris or in any of the other manuscripts of Lord Hale, apocryphal or genuine, nor in any cases cited by counsel below in discussing the phrase "property affected with a public interest" will be found any authority for the statement that before the state may interfere

to protect some of its citizens against the fraud of others or from the fraud of citizens of another state there must be involved "property affected with a public interest." All that De Portibus Maris and all that each and every case which has followed it in respect to the matter under discussion claimed or claims is that "where one devotes his property to a use in which the public has an interest he must submit to be controlled by the public for the common good."

Anomalous indeed would be the situation that although prevention is the sole purpose of and justification for our criminal law, yet the state is powerless to adopt other reasonable measures to prevent the perpetration of a fraud, but must wait until after the fraud is committed and then attempt to punish the guilty, rendering to the innocent no protection, but simply whatever satisfaction may have come from a conviction or uncollectible judgment against the guilty party.

Even if it were necessary to have in hand a subject which could meet all the technical definitions of being affected with a public interest, it is to be pointed out that corporate stocks, bonds and other securities are the creatures of public statutes and may be issued only as authorized by law. Is it not then of "public interest" that the state does not by law authorize the issue of fraudulent stocks, bonds or other corporate securities?

However, we contend and are supported by many cases decided by this court that whatever affects the public welfare is "affected with a public interest."

We respectfully suggest that if the court below had examined the case of German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (cited and quoted in our brief below

together with a review of the cases of Munn v. Illinois, Budd v. New York, and Brass v. North Dakota) that no such conclusions as to the limitation of the above doctrine would have been reached. That doctrine is carefully reviewed in the **German Alliance Insurance Company** case where this court in the opinion by Mr. Justice McKenna flatly answers the same contentions that were made in the instant cases in the court below. The court after reviewing the case of Munn v. Illinois, 94 U. S. 113, said:

> "The principal was expressed as to property, and the instance of its application was to property, **but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.**
>
> That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had 'no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business.' The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest; but this explanation overlooked the fact that both the common law and the act of parliament were exercises of government regulation of a strictly private business in the interest of public policy,—a policy which still endures and still dictates regulating laws. Against that conservatism of the mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government —state and national—has pressed on in the general welfare; and our reports are full of cases where in

instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn v. Illinois was approved in many state decisions, but it was brought to the review of this court in Budd v. New York, 143 U. S. 517, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated, and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good, and declared its entire accommodation to the limitations of the constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In Brass v. North Dakota, 153 U. S. 391; Munn v. Illinois and Budd v. New York were affirmed. A law of the state of North Dakota was sustained which made all buildings, elevators, and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it,—that to justify regulation of a business the business must have a mo-

nopolistic character. That distinction was pressed and answered. It was argued, the court said, 'that the statutes of Illinois and New York (passed on in the Munn and Budd Cases) are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combination to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities.' And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads, and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was 'for those who make, not for those who interpret, the laws.' And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws than to their validity, yet, it was further said, the expressions had their value because the 'obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law.'

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in the Budd Case (117 N. Y. 27), that the attempts made to place

the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected, cannot be supported. 'The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.' "

(b) The Court Below Erred in Holding That the Ohio Blue Sky Law Violated Due Process.

The court below in their opinion (Record p. 41) said:

> "Even an effort is made to deny him access to the federal courts."

With all due respect to the court below there is nothing in the law to justify this statement. It is true that under **Section 6373-3, General Code of Ohio** (part of the Blue Sky Law) it is provided that:

> "The applicant at the same time shall also file with said 'commissioner' a duly executed written instrument, irrevocable, consenting that any action brought against such applicant, arising out of and founded upon the fraudulent disposal of such securities by him or his agents, may be brought in Franklin county, and that, in the event that proper service of process cannot be had upon such applicant in such county, service of process made therein by the sheriff of such county, by sending a copy thereof by registered mail, at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application or such other place as the applicant may thereafter designate in writing filed with the 'commissioner', shall have the same effect as if personally made upon the applicant according to the laws of this state."

There is no attempt to say that the "applicant" may not thereafter remove the case to a federal court, if other-

wise removable. All the state attempts to say is that if a citizen of this state is defrauded in a stock transaction by a licensee under the Blue Sky Law, it will not be necessary for him to travel outside of his own state in order to bring an action for the recovery of his money or the damage sustained. This is far from denying to the so-called dealer the right of access to the federal courts. The only other place that such a matter is in any wise mentioned is in Section 6373-8, General Code of Ohio, where if a party be dissatisfied with the decision of the commissioner he may file a petition against the commissioner in the Common Pleas Court of Franklin county, Ohio and if the decision be against the commissioner the action shall be final.

Certainly the state of Ohio has the right to prescribe in what one or more of its courts proceedings may be had to review the action of one of its officials. Besides, even if the provision of the state law did flatly prescribe, that is attempt to forbid a litigant taking his case to a federal court, that part of the law would of course be invalid, but it would by no means necessarily invalidate the whole law.

The court below in its opinion (Record, p. 41) went very far in imagining possible misconduct by the state officials. Notwithstanding the law specifically gives to every applicant a quick and easy appeal to a court of record from the action of the commissioner (General Code of Ohio, Section 6373-8) and notwithstanding the fact that **Section 2 of Article XIII of the constitution of Ohio** contains the provision:

> **"Corporations may be classified and there may be conferred upon proper boards, commissioners or officers, such supervisory and regulatory powers**

over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law."

The **court below** said (Record, p. 41):

> "The uncontrolled discretion and even a whim and caprice (if we give them play) of the commissioner or of his assistant (subject to the commissioner's supervision) may not only halt but injure and perhaps destroy a worthy business enterprise and cast a cloud on the name of the applicant or licensee when such applicant or licensee seeks redress in the court. * * * "

The court below certainly could not have had in mind the rule reiterated by the present chief justice in the first Sales in Bulk case **(Lemieux v. Young, 211 U. S. 489-493)**:

> "But a 'possible application to extreme cases' is not the test of the reasonableness of public rules and regulations."

Or the language of Mr. Justice McKenna in the case of **District of Columbia v. Brooke, 214 U. S. 138-150,** wherein he said:

> "A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws."

While the people of this nation properly have a very high regard for their judges, it can hardly be said that they consider them the sole reservoir of all integrity. There is no reason why an administrative officer may not be just as fair and honest as a judge—they are both

made of the same clay, the oath of one is as solemn and binding as that of the other. The incentive of service is just as great with one as the other.

In the case of **State v. Lynch, 151 N. W. 81-84,** the Supreme Court of Iowa said:

> "Those courts which uphold the inquiry as to whether the legislature has observed the mandatory provisions of the constitution necessarily assume that it were safer to entrust the enforcement of these to the judicial department than the legislature, and that the judicial department is the only one in which sufficient integrity exists to insure observance of the provisions of the constitution. Such an attitude seems intolerable and not to be endured."

It is respectfully submitted that the same observation or comparison might be made with respect to the administrative branch of the government.

But compare the attitude in the opinion of the court below with the attitude of this court in the case of **Engel v. O'Malley, 219 U. S. 128-137,** where upon a similar complaint that the comptroller might refuse a license upon his arbitrary whim and that there were no guides in the law for the exercise of that discretion, this court through Mr. Justice Holmes said:

> "* * * that in each case the comptroller was expected to act for cause. But the nature and extent of the remedy, if any, for a breach of duty on his part, we think it not necessary to consider."

In the case of **Brazee v. Michigan** (decided May 22, 1916), 241 U. S. 340, there was involved the validity of the employment agency act of Michigan. It was contended that this act contravened the Fourteenth Amendment. Under that law licenses were issued by the com-

missioner and might be revoked for cause. The commissioner was charged with the enforcement of the law and was given power to make necessary rules and regulations. In the opinion of this court by Mr. Justice McReynolds it was said:

> "Considering our former opinions it seems clear that without violating the federal constitution, a state, exercising its police power, may require licenses for employment agencies, and prescribe reasonable regulations in respect of them, **to be enforced according to the legal discretion of the commissioner.**" (Black face ours.)

The various public utility commission and workmen's compensation statutes all give to either a commissioner or to an administrative board large discretion in the administration of the law.

In the case of **Reetz v. Michigan, 188 U. S. 505,** this court by Mr. Justice Brewer said (p. 507):

> "It is objected in the present case that the board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the applicant had been 'legally registered under act No. 167 of 1883.' That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. * * * Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. **Due process is not necessarily judicial process.** Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272; Davidson v. New Orleans, 96 U. S. 97, Ex Parte Wall, 107 U. S. 265-289; Dreyer v. Illinois, 187 U. S. 71-83; People v. Hasbrouck, 11 Utah, 291. In the last

case this very question was presented, and in the opinion, on page 305, it was said:

'The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties. * * *' "

Further on in the opinion it is said (p. 508):

"Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted."

Still further on in the opinion it was said (p. 509):

"It is further insisted that it is essential to a judicial or quasi-judicial proceeding that it should give a person accused or interested the benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify." (Black face ours.)

The court called attention to the fact that the board had annual meetings; that the plaintiff did not appear at any of these meetings and that there was no showing that the plaintiff had been denied a hearing. This same observation may be made in the cases at bar. As a matter of fact the answer on file below in the case of The Geiger-Jones Company, as well as in the case of Coul-

trap, shows that the Geiger-Jones Company was given a hearing and it was anticipating the results of the showing made at the hearing that they attempted to seek the protection of a federal court.

That it was proper even before the amendment of Section 2 of Article XIII of the Ohio constitution for the legislature to impose upon a ministerial officer authority to ascertain facts and apply the law thereto, was established as the law of Ohio many years ago.

In the case of **State v. Harmon, 31 O. S. 250, 259,** it was said:

> "Whether power in a given instance ought to be assigned to the judicial department, is ordinarily determinable from the nature of the subject to which the power relates. In many instances, however, it may appropriately be assigned to either of the departments.
>
> It is said authority to hear and determine a controversy upon the law and fact is judicial power.
>
> That such authority is essential to the exercise of judicial power is admitted; but it does not follow that the exercise of such authority is necessarily the exercise of judicial power.
>
> The authority to ascertain facts and to apply the law to the facts when ascertained appertains as well to the other departments of the government as to the judiciary. Judgment and discretion are required to be exercised by all the departments."

This case was cited and followed by the Supreme Court of Ohio in the case of **France v. The State, 57 O. S. 1.**

At page 17 of the opinion the court says:

> "One objection made to the statute is that by those provisions of Section 4403-C, which authorize the medical board, for the causes therein mentioned, to refuse or revoke certificates of qualifica-

tion required of physicians before they are entitled to practice in this state, and provide for an appeal to the governor and attorney general, it assumes to confer judicial power which under Section 1 of Article 4 of the constitution of the state belongs exclusively to the courts."

The court further says at the same page, after quoting the portion of the opinion in the case of State v. Harmon, supra, above set out:

"It would be difficult to draw the precise line between those functions that may be constitutionally devolved upon the other departments and those which pertain strictly to the judiciary; and so far as we are aware the attempt has not been made. But in numerous instances, from an early period in the history of the state, the legislature has invested various boards, bodies and officers with the power and charged them with the duty of ascertaining facts and hearing and deciding questions when deemed necessary or expedient, in order to carry into execution laws enacted to accomplish some public need or purpose or deemed for the public good."

"Those (powers) conferred on the medical board by the statute here under consideration are plainly not of that (judicial) character. * * * The powers of the board bear a close analogy to those of boards of school examiners who are authorized to grant certificates to teach in the public schools to applicants who are found on examination to possess the necessary qualifications and furnish satisfactory evidence of good moral character; and to revoke any certificate granted for intemperance, immoral conduct or other good cause. These boards, in the discharge of their duties, do not exercise the judicial power which the constitution has reserved to the courts, but are public agencies designated by the state to aid in making its common school system effective. And the medical board is but an agency of a like character, clothed with similar powers to insure the effective execution of a law designed for

the promotion of the public health and welfare. The purpose of the statute undoubtedly is, by enforcing the requirements it has prescribed for the admission of persons to the practice of medicine in this state, to prevent those from engaging in the practice of that profession who from lack of proper knowledge **or want of moral rectitude** are unfit to be entrusted with its important and responsible duties. The power to pass upon the qualifications required must necessarily be committed to some board or body other than the legislature, and may be not inaptly characterized as administrative, rather than judicial, within the meaning of the constitution."

In the case of **Reetz v. Michigan, 188 U. S. 505,** the third branch of the syllabus is as follows:

> "There is no provision in the federal constitution forbidding the state from granting to a tribunai, whether called a court or a board of registration, the final determination of a legal question. Due process of law is not necessarily judicial process. * * * "

In the opinion at page 507, the court quotes from the case of People v. Hasbrouck, 11 Utah 291, as follows:

> "In the last case this very question was presented and in the opinion on page 305 it was said:
>
> 'The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise judicial power as that phrase is commonly used and as it is used in the organic act in conferring judicial power upon specified courts.' The powers conferred on the board of medical examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools. * * * The ascertainment and determination of qualifications to practice medicine by a board

> **of competent experts appointed for that purpose is not the exercise of a power which appropriately belongs to the judicial department of the government."**

A question involving the same principle was decided by Judge Sater (one of the judges below) in the case of **Tucker et al. v. Williamson t al., 229 Fed. Rep. 201**. The question arose in this way The Harrison Narcotic Act prohibited the sale of certain narcotics but permitted their sale by a duly registered physician in the course of his professional practice. The department of internal revenue, in enforcing said act, undertook to prescribe what should be deemed "professional practice," and it was claimed that the department had no authority to make such a ruling, that being a judicial question for the determination of the courts.

The court calls attention to the fact that "unprofessional" has been held to be synonymous with "dishonorable," citing State v. Medical Examining Board, 32 Minn. 324, and, after citing the case of France v. State, 57 O. S. 1, above mentioned, and quoting that portion of the opinion in the case of People v. Hasbrouck, 11 Utah 291, above set out, says (p. 212):

> "Congress established a board, as it were, with powers akin to those of a board of medical examiners or a board of school examiners or a board of equalization, to determine what applicants possess the requisite qualifications for registration and practice under the narcotic law. In unmistakable language it indicated that their practice must be legitimate and professional."

In the case of **United States v. Grimaud, 220 U. S. 506**, this court upheld the legislation of congress which delegated to the secretary of agriculture the power to make

administrative rules for the purpose of protecting certain forest reservations in the United States. In the opinion of the court by Mr. Justice Lamar (page 517) it was said.

> "From the beginning of the government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for the administering of the law which did govern them."

(c) Equal Protection—Classification.

The court below also fell into the error of assuming that the Ohio Blue Sky Law denied equal protection thus violating the Fourteenth Amendment (Record, p. 42).

Assuming as the court below did, that the sale of corporate stocks could not be regulated by statute they did not attempt to analyze the reason for the apparent discriminations they point out. The purpose of the Ohio Blue Sky Law, as stated in its title is to **prevent fraud** in the sale of stocks, bonds and other securities. The method of preventing fraud is to regulate the sale within the state by so-called "dealers" (defined in the act) in certain kinds of corporate stocks, securities, etc.

The particular evil which the legislature was seeking to correct did not exist in those stocks, bonds and securities listed and sold on regularly organized stock exchanges at a commission of less than one per centum of the par value thereof for the legislature knew that before such stocks, bonds and securities could be listed on a stock exchange a rigorous examination—far more thorough than any Blue Sky Law—was conducted to ascertain the exact condition of the issuer of the securities.

Neither did the particular evil which the legislature sought to reach exist in cases where there were actual sales from time to time for not less than six months preceding, which sales were published in the market reports in the **news columns** of some newspaper of general circulation in the state.

In the case of **Virginia v. West Virginia, 238 U. S. 202,** it was said by Mr. Justice Hughes at page 212:

> "It is unquestioned that, in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence." (Citing a number of cases.)

The evil to be remedied was not to be found in the case of an individual making a single isolated sale of his own property. Manifestly, there is a wide difference between such a bona fide owner who makes a single sale of his own property and the so-called underwriter or promoter.

Where a corporation was able to sell one person more than fifty per cent of an issue of corporate bonds the legislature felt that there was some assurance that there was no "blue sky" in such transactions as such a person would or ought to be able to make an investigation for himself. Besides, such person could not turn around and retail those securities without complying with the law.

Where a standard manual of information approved by the commissioner contained the information required by the blue sky law the legislature knew that the prospective investor would be in a position to obtain impartial information.

The legislature knew that "blue sky" was not being sold by men who were members of regularly organized

stock exchanges and who maintained an established and lawfully conducted place of business within the state, regularly open for public patronage, where their compensation for such sales was less than one per cent of the par value of the security.

What the legislature sought to do was to protect the small investor—the legislature sought to reach and regulate sales to the small investor under false pretences; to protect the man who was not in position to protect himself. Such a law was enacted not only to check up the representations of the promoter and underwriter, who heretofore had been able to escape the criminal law because it could not be proved beyond all reasonable doubt that the representation made by which and without which the victim would not have parted with his money was of "existing facts" as contradistinguished from "promises" or "trade boosting," but also to lock the stable before the horse was stolen by preventing the frugal citizen with money to invest from being victimized by slick, well-groomed, money spending sharks. The so-called promoters and underwriters by appealing to the cupidity of some prominent ex-office holders and business men were able to secure the use of such persons' names as directors or "references." Men in responsible positions to whom the small investor was wont to go for advice were offered, and all too often accepted, secret commissions from the promoter or underwriter on sales influenced by their advice. Forged or fraudulent so called "public audits" elaborately gotten up were frequently resorted to. In other instances, the books would first be fixed up by the aid of a so-called "appraisal company" or by the arbitrary increase of the value of plant

account or some particular asset. Then a public accountant would be called in to **audit the books** and this public accountant would certify that the **books** showed thus and so. The evil became so widespread that more than twenty different states enacted blue sky legislation.

Under many decisions of this court the legislature has a right to classify these transactions and the fact that in the class which the legislature covered were many honest enterprises, did not, as long as it is recognized that the class also covered fraudulent schemes, militate against the legislative power in the premises. The Ohio legislature attempted to leave the widest possible latitude of freedom consistent with accomplishing the object sought. It narrowed the law down to cover that class of securities and that class of sales where fraudulent practices were well known to obtain. That embraced within this same class will be found many honest transactions does not render the law void. Honest business must submit to regulation and inspection in order that dishonest business may be outlawed, prosecuted and punished for its dishonesty. Our criminal laws are not made for the law-abiding but for the law-avoiding, and the former must submit to them as well as the latter.

As said by Mr. Justice McKenna in the case of **Heath v. Worst, 207 U. S., 338-357**:

> "It was the experience of the people not the acts of some progressive manufacturers which directed the legislation and it was to protect the people, when following the opinions formed from that experience, from deception, that the statute was enacted. It may be that the purpose could have been accomplished better in some other way. It may be that it would have been more entirely adequate, let

us say, even more entirely just to have required **that all paint should be** labeled; the statute nevertheless cannot be brought under the condemnation of the Fourteenth Amendment. **Legislatures, as we have seen, have the constitutional power to make unwise classifications.**" (Black face ours.)

In the case of **Engel v. O'Malley, 219 U. S., 128-137,** Mr. Justice Holmes in the course of the opinion said:

"Again it is argued that the statute makes unconstitutional discriminations by excepting the classes mentioned in paragraph 29d above, especially those in whose business the average amount of each sum received is not less than five hundred dollars and those who give bonds of one hundred thousand or fifty thousand. **But the former of these exceptions has the manifest purpose to confine the law as nearly as may be to the class thought by the legislature to need protection**, and the latter merely substitutes a different form of security, as it well may. 'Legislation which regulates business may well make distinctions depending upon the degree of evil.' Heath v. Worst, 207 U. S. 355-356. It is true, no doubt, that where size is not an index to an admitted evil the legislature cannot discriminate between great and small. **But in this case size is an index.**" (Black face ours.)

And we respectfully submit that in blue sky legislation **"size is an index."**

In **New York v. Reardon, 204 U. S. 152-157,** it was held that a tax on transfers of corporate stock imposed by New York laws was not invalid under the Fourteenth Amendment as making an arbitrary discrimination in favor of sales of other kinds of personal property such as corporate stock on margin, and corporate bonds. In the course of the opinion of the court by Mr. Justice Holmes it was said:

"But it is argued that different considerations apply to the states and the tax is said to be bad

under the Fourteenth Amendment for several reasons. In the first place it is said to be an arbitrary discrimination. This objection to a tax must be approached with greatest caution. The general expressions of the amendment must not be allowed to upset the familiar and long established methods and processes by a formal elaboration of rules which its words do not import."

In the case of **Jeffrey v. Blagg, 235 U. S. 571,** this court held that the Ohio Workmen's Compensation Act, which applied only to employers of five or more workmen or operatives, was not such an arbitrary and unreasonable classification as placed it beyond legislative authority.

In the course of the opinion of this court, Mr. Justice Day said (bottom page 576):

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 and previous cases cited in this court on page 79. **That the law may work a hardship and inequality is not enough.** Many valid laws from the generality of their application necessarily **do that,** and the legislature must be allowed a wide field of choice in determining the subject matter of its laws and what shall come within them and what shall be excluded." (Black face ours.)

In the recent case of **Rast v. Van Deman & Lewis Co.,** 240 U. S. 342-357, Mr. Justice McKenna, speaking for this court, said:

"It is established that a distinction in legislation is not arbitrary if any state of facts reasonably can

be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61-78. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. C. B. & Q. R. Co. v. McGuire, 219 U. S. 549; German Alliance Ins. Co. v. Lewis, 233 U. S. 389; Price v. Illinois, 238 U. S. 446. 'It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury but obstacles to a greater public welfare.' Eubank v. Richmond, 226 U. S. 137; Sligh v. Kirkwood, 237 U. S. 52-59, and we repeat 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary.' Quong Wing v. Kirkendall, 223 U. S. 59, and the cases cited above."

Mr. Justice McKenna in the course of the opinion in **German Alliance Ins. Co. v. Lewis, 233 U. S. 389**, said (p. 418):

> "Legislative classification may rest on narrow distinctions. Legislation is addressed to the evils as they may appear and even degrees of evil may determine its exercise."

In the case of **Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61**, a case frequently cited by the Supreme Court of the United States, this court by Mr. Justice Van Devanter said (page 78):

> "1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and **avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary**. 2. A classification having some reasonable basis does not offend against that class

merely because it is not made with mathematical nicety **or because in practice it results in some inequality.** 3. When the classification in such a law is called in question, **if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.** One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary." (**Black face ours.**)

In the case of **The Central Lumber Co. v. South Dakota, 226 U. S. 157,** one of the contentions therein made was that it was partial and discriminatory legislation and violated the equal protection clause of the Fourteenth Amendment for two reasons: first, because it attempted to make certain acts an offense when committed by one class of persons and no offense when committed by other classes; second, because it is not the exercise of the so-called police power for the benefit of the public generally, but only for the benefit of a particular and limited class, to wit, the "regular established dealer."

Commenting upon this, this court by Mr. Justice Holmes said (page 159):

"The subject matter like the rest of the criminal law is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts as alleged with the constitution of the United States. The grounds on which it is said to do so are that it denies the equal protection of the laws because it affects the conduct of only a particular class—those selling goods in two places in the state—and is intended for the protection of only a particular class—regular established dealers; also because it unreasonably limits the liberty of people to make such bargains as they like.

On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the acts constituting the offense, and it is urged that to punish selling goods in one place lower than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary effort of traders at a single place. **The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination.** If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists **without covering the whole filed of possible abuses** and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." (Black face ours.)

In the case of **Otis v. Parker, 187 U. S., 606,** which upheld the provision of Article IV of the constitution of California providing that: "All contracts for the sales of shares of capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Mr. Justice Holmes, speaking for this court, said (p. 608):

"It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be dis-

posed of to advantage, thus depriving persons of liberty and property without due process of law and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws. * * *

Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held **semper ubique et ab omnibus.**"

Honest business must submit to regulation and inspection in order that dishonest business may be outlawed, prosecuted and punished for its dishonesty.

In the case of **Lemieux v. Young, 211 U. S., 489,** a law was held constitutional which, while permitting a merchant who had no debts to sell his entire stock without notice, or if he had debts and paid them before or after the sale, forbade others to sell until after certain notice had been given.

In the case of **District of Columbia v. Brooke, 214 U. S. 138,** this court, through Mr. Justice McKenna, said in discussing the Fourteenth Amendment (page 150):

"That amendment is unqualified in its declaration that a state shall not deny to any person within its jurisdiction equal protection of the laws. Passing on the amendment we have repeatedly decided—so often that a citation of cases is unnecessary—that it does not take from the states the power of classification. **And also that such classification need not be either logically appropriate or scientifically accurate.** The problems which are

met in the government of human beings are different from those involved in the examination of objects of the physical world, and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws." (Black face ours.)

Various classifications were also sustained in the following cases:

Postal Tel. Co. v. Charleston, 153 U. S. 692.
Pacific Express Co. v. Seibert, 142 U. S. 339.
Charlotte, Columbia & Augusta R. R. v. Gibbs, 142 U. S. 386.
Central Loan & Trust Co. v. Campbell, 173 U. S. 84.
Clark v. Kansas City, 176 U. S. 114.
Erb v. Morasch, 177 U. S. 584.
Gundling v. Chicago, 177 U. S. 183.
Am. Sug. Refining Co. v. La., 179 U. S. 89
Williams v. Fears, 179 U. S. 270.
Clark v. Titusville, 184 U. S. 329.
Consolidated Coal Co. v. Ill., 185 U. S. 203.
Fidelity Mut. Life Asso. v. Mettled, 185 U. S. 308. [redacted].
Travelers Ins. Co. v. Conn., 185 U. S. 364.
Farmers & M. Ins. Co. v. Dobney, 189 U. S. 301.
Cin. St. Ry. Co. v. Snell, 193 U. S. 30.
Rippey v. Texas, 193 U. S. 504.
M. K. & T. Ry. Co. v. May, 194 U. S. 267.
Savannah T. & I. v. Savannah, 198 U. S. 392.
Minnesota Iron Co. v. Kline, 199 U. S. 593.
Bacon v. Walker, 204 U. S. 311.
Wilmington S. Mining Co. v. Fulton, 205 U. S. 60.
Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251.
McLean v. Arkansas, 211 U. S. 539.
Williams v. Arkansas, 217 U. S. 79.
Southwestern Oil Co. v. Texas, 217 U. S. 114.

Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406.
Broadnax v. Missouri, 219 U. S. 285.
C. R. I. & P. Ry. v. Arkansas, 219 U. S. 453.
Mutual Loan Co. v. Martell, 222 U. S. 225.
Quong Wing v. Kirkendall, 223 U. S. 59.
Murphy v. California, 225 U. S. 623.
Barrett v. Indiana, 229 U. S. 26.
Metropolis Theater Co. v. Chicago, 228 U. S. 61.
Central Lumber Co. v. South Dakota, 226 U. S. 157.
Clement Nat. Bank v. Vermont, 231 U. S. 120.
Sturgiss & Burn Mfg. Co. v. Beauchamp, 231 U. S. 320.
Patsone v. Pennsylvania, 232 U. S. 138.
Farmers & Mechanics Sav. Bank v. Minnesota, 232 U. S. 516.
O. R. & W. Ry. Co. v. Dittey, 232 U. S. 576.
Baccus v. Louisiana, 232 U. S. 334.
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304.
Erie R. R. Co. v. Williams, 233 U. S. 685.
International Harvester Co. v. Missouri, 234 U. S. 199.
Keokee Con. Coke Co. v. Taylor, 234 U. S. 224.
Atlantic C. L. R. R. v. Georgia, 234 U. S. 280.

(d) Interstate Commerce.

The court below fell into the further error of holding that the Ohio Blue Sky Law is a regulation of interstate commerce.

The Ohio Blue Sky Law in no wise interferes with interstate commerce. **The law simply attempts to regulate sales within the state of Ohio by persons within the state.** Section 1 of the law, being **Section 6373-1 of the General Code of Ohio,** provides:

> "Except as otherwise provided in this act, no **dealer** shall, **within this state,** dispose or offer to

> dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments. * * * " (Black face ours.)

This provision of the law clearly indicates that the license is required only of "dealers" and that that "dealer" must at the time he is engaged in the sale be "within this state" in order to be subject to the license or the law.

Again, in the following section, Subdivision 3, the statute defines the term "dealer" as follows:

> "The term 'dealer' as used in this act, shall be deemed to include **any** person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except: * * * " (Black face ours.)

It will be observed that any person outside of the state may sell to any person within the state, or any person within the state may buy of any person outside of the state or may sell to any person outside of the state any stock of domestic or foreign corporations free from the statute. From the whole statute it is quite evident that the license is upon the "business of dealing" in stocks, bonds and securities and not upon any single isolated transaction. **The shipment is not taxed or regulated.**

In the case **New York v. Reardon, 204 U. S. 152,** the facts were as follows: The relator, Hatch, a resident of Connecticut, sold in New York to one Maury, also a resident of Connecticut, but doing business in New York,

100 shares of the Southern Railway Company, a Virginia corporation, and 100 shares of the stock of the Chicago, Milwaukee & St. Paul Railroad Company, a Wisconsin corporation, and on the same day and in the same place received payment and delivered the certificates assigned in blank. The claim was made that this was interstate commerce. This court in the opinion by Mr. Justice Holmes (page 161) said:

> "There is not a shadow of ground for calling the transaction described such commerce."

It is provided in Section 6373-4, General Code of Ohio, that application for registration as a licensed dealer shall not be acted upon until the expiration of one week from the publication of the notice, **but must be acted upon within twenty days** after proof of such application has been filed. The same section authorizes the commissioner to grant temporary permission to such applicant to transact business as a dealer pending the granting of a permanent license.

Unmindful of the rule laid down in the first sales in bulk case **(Lemieux v. Young, 211 U. S. 489-493)** where, after stating that

> "It is, of course, possible that an honest and solvent retail dealer might in consequence of the required notice before the sale lose an opportunity of selling his business or suffer some loss from the delay of a sale occasioned by the giving of such notice,"

this court, through its present chief justice, quoted the following:

> "But a 'possible application to extreme cases' is not the test of the reasonableness of public rules and regulations. Com. v. Plaisted, 148 Mass. 375-

382. 'The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public.' C. B. & Q. R. Co. v. State, 47 Nebr. 549-564."

The court below held this provision of the law a direct burden upon interstate commerce. No particular issue was raised as to this feature of the law by the pleadings. Indeed, none of the plaintiffs below were in position to complain because of this feature of the law for The Geiger-Jones Company and Coultrap had their licenses and were seeking to prevent their cancellation, while Rose and The RiChard Auto Manufacturing Company never had applied for a license.

In the case of **Standard Stock Food Company v. Wright, 225 U. S. 540,** this court, through Mr. Justice Hughes, said (page 550):

"The case in this aspect falls within the established rule 'one who would strike down a state statute as violative of the federal constitution must bring himself by proper averment and showing within the class as to whom the act thus attacked is unconstitutional. **He must show that the alleged unconstitutional feature of the law injures him,** and so operates as to deprive him of rights protected by the federal constitution.' " (Black face ours.)

Citing a number of cases.

In the case of **District of Columbia v. Brooke, 214 U. S. 138,** this court, speaking through Mr. Justice McKenna, said (page 152):

"Other criticisms are made of the law to display what is alleged to be its lack of uniformity. For instance, a supposition is made of tenants in common, some of whom are residents and others are non-residents, and the possible difficulties that may

arise from such ownership under the act; and it is asked that if the property belongs to resident minors or insane persons or persons under legal disability, can the act be enforced against them or against their property? **To these suppositions and questions we answer that it will be time enough to reply when a case arises in which they are presented and to determine then the operation of the act upon the persons enumerated."**

In its opinion the court below held (page 39):

> "In the present act the prohibition from the transaction of business must extend for a week and possibly twenty or thirty days or more; it therefore offends against the constitution quite as much as the first Michigan act."

This court will observe that the law is mandatory that licenses must be granted or refused within twenty days, and the law further authorizes the commissioner to grant instantly a temporary license pending the issuance or refusal of a regular license.

In this respect the Ohio law differed vitally from the original Michigan case. In the **Michigan case** the court found (210 **Fed. 181**):

> "During the period of 30 days after the application is made and data filed with the commission, there can be no sale of securities. The commission is powerless to permit; any company which issues and sells or any dealer who sells is guilty of a felony."

Sight should not be lost of the fact that the first Michigan law attempted to cover not only all kinds of stocks, bonds and securities, including those listed on the recognized exchanges of the country, but also negotiable instruments as well, which is a vastly different classifica-

tion both as to subject matter and breadth from the present law.

The fundamental error into which the court below fell in this respect was in holding that the transaction, to wit, the securing of a license **by a dealer within the state of Ohio to sell certain securities within the state of Ohio,** was interstate commerce or a regulation of interstate commerce.

While the opinion of the court below in respect to interstate commerce was based upon the precedents of the Michigan, Iowa, West Virginia and South Dakota blue sky cases **(which cases we have heretofore shown were based upon the false premise that Nathan v. Louisiana and Paul v. Virginia had been overruled by this court)** the court below in its opinion also cited and discussed the cases of Crutcher v. Kentucky, 141 U. S. 47; International Text Book Co. v. Pigg, 217 U. S. 91, and Buck Stove & Range Co. v. Vickers, 226 U. S. 205 (Record, p. 38). We respectfully submit that these cases are not in point in any consideration of the Ohio Blue Sky Law.

1. **Crutcher v. Kentucky, (141 U. S. 47),** has this syllabus:

> "The act of the legislature of Kentucky of March 2, 1860, 'to regulate agencies of foreign express companies,' which provides that the agent of an express company not incorporated by the laws of that state shall not carry on business there without first obtaining a license from the state, and that, preliminary thereto, he shall satisfy the auditor of state that the company he represents is possessed of an actual capital of at least $150,000, and that if he engages in such business without license he shall be subject to fine, is a regulation of interstate commerce so far as applied to a corporation of another state engaged in that business, and is, to that ex-

tent, repugnant to the constitution of the United States."

The act in question was entitled "An Act to Regulate Agencies of Foreign Express Companies." It had nothing to do with "preventing frauds by the sale of worthless stocks."

The whole Kentucky statute in question related to foreign express companies exclusively, requiring them to obtain a license from the state of Kentucky before doing business within the state.

The express companies affected by this statute, and particularly the one involved in the case, were **agencies** or **facilities** of interstate commerce and the Kentucky statute forbade their transaction of business within the state without first obtaining a license from the state. Prerequisite to the issuing of that license, statements had to be made and filed in the auditor's office showing that the foreign express company was in possession of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes, etc.

Not only was this a clear burden upon an agency of interstate commerce, to wit: a transportation company, but it was also clearly a discrimination against foreign express companies doing interstate business and in favor of Kentucky express companies.

The above case furnishes the basis for the case of International Text Book Co. v. Pigg, 217 U. S. 91.

2. The **International Text Book Company** case differs from the Crutcher case in that while in the Crutcher case a facility—i. e., transportation—of commerce was involved in the Text Book case it was the **sale** of articles,

to wit: instruction papers, text books and illustrative apparatus for courses of study to be pursued by means of correspondence, which articles were sold by a person in one state to a person in another state, necessitating the **transportation** from the first state to the second state.

The **Kansas statute** in this case provided, among other things, that

> "A corporation organized under the laws of any other state, territory or foreign country and seeking to do business in Kansas, may make application to the state charter board, composed of the attorney general, the secretary of state and the state bank commissioner, for 'permission' to engage in business in that state as a foreign corporation. It is necessary that the application should be accompanied by a fee of $25, and as a condition precedent to obtaining authority to transact business in the state, a corporation of another state was required to file in the office of the secretary of state its written consent, irrevocable, that process against it might be served upon that officer.
>
> "Before filing its charter, or a certified copy thereof, with the secretary of state, the corporation is required to pay to the state treasurer for the benefit of the 'permanent school fund' a specified per cent of its capital stock," etc.

This statute also **related exclusively to foreign corporations doing an interstate business in Kansas**. It attempted to close the doors of the courts of Kansas to foreign corporations engaged in interstate commerce unless they complied with the Kansas statute. Clearly this was a burden upon interstate commerce because it interfered with the collection of the sale price of a commodity transported from one state to another. Also as in the Kentucky statute it was a discrimination against for-

eign corporations and in favor of the local state corporations.

This decision served as a basis and authority for the following case.

3. **Buck Stove Co. v. Vickers, 226 U. S. 205.** This case involved the same principles as the International Text Book Company case. It was conceded, as stated in the opinion, that the corporations involved in that case were doing purely interstate business and the statute of Kansas attempted to prevent them maintaining an action based upon such interstate business in the courts of Kansas until there had been a compliance with certain laws as in the preceding case.

Boiled down, then, these three cases involve, as to the Crutcher case, an interference by a state with an **agency** or **facility** of interstate commerce, and in the other two cases the denial to persons engaged in interstate commerce of the right to maintain actions in the state court in respect to that interstate commerce. All three of the cases involve regulations which were discriminatory against foreign corporations.

Far more appropriate to a consideration of the Ohio Blue Sky Law would have been the case of Emert v. Missouri, 156 U. S. 296, and the many cases set out in the opinion of the court beginning on page 313. These cases will be referred to in another part of this brief.

Criticism of Law by Court Below.

In endeavoring to narrow the law down as closely as possible to the class of transactions where it was admitted fraud existed, and excepting those classes of transactions generally recognized to be free from fraud, the

wording of the law was necessarily increased, detracting from the clearness that easily would be present where by a few words everything might be included. To leave no question as to the justification of the state in passing the law many things were excluded and while the court below said in the course of its opinion relative to reviewing the law itself (Record p. 31):

> "* * * a task rendered difficult on account of the numerous exceptions to its general provisions, and in some instances of exceptions to exceptions"

attention is directed to the language of the opinion of this court in the case of **Metropolis Theatre Co. v. Chicago, 228 U. S. 61-69:**

> "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones, and may justify, if they do not require, rough accommodations,—illogical, it may be, and unscientific, but even such criticisms should not be hastily expressed. What is best is not always discernible. The wisdom of any choice may be disputed or condemned. Mere errors of judgment are not subject to our judicial review. It is only palpably arbitrary exercises which can be declared void under the Fourteenth Amendment."

We respectfully submit that we have shown by apt quotations from the reasoning of this court that the court below was clearly in error in holding that the Ohio Blue Sky Law violates either the Fourteenth Amendment or Section 8 of Article I of the Federal Constitution.

Notwithstanding the length to which this brief has attained (necessitated largely by the quotation from the Supreme Court Reports of illustrations of principles disregarded by the court below), on account of the importance of this case to the people of the state of Ohio, we trust that we may be pardoned and indulged in briefly stating some of the principles of law for which we contend and which we believe amply justify the **power** of **the state to enact the legislation in question.**

2. The Enactment of the Ohio Blue Sky Law Was a Valid Exercise of Power by the State.

We submit the following propositions which we respectfully contend amply justify the validity of the Ohio Blue Sky Law:

(a) The Ohio Blue Sky Law is a reasonable exercise of the police power of the state, being designed merely to prevent fraud.

(b) The Ohio Blue Sky Law in no wise contravenes the Fourteenth Amendment.

(c) The Ohio Blue Sky Law in no wise contravenes Section 8 of Article I of the Constitution of the United States because:

(a) The law simply attempts to regulate sales within the state of Ohio by persons within the state to persons within the state.

(b) That which is not capable of transportation cannot become the subject of interstate commerce. Certificates of stock being mere muniments of title to property permanently located in one state, and bonds and securities, being mere choses in action giving rise to rights of action, may not be the subjects of interstate commerce.

(c) Even assuming that the Blue Sky Law may be a regulation of interstate commerce, the provisions of the law do not conflict with the power delegated to congress by what is known as the interstate commerce clause.

The foregoing propositions will be discussed in their order.

(As to the interstate commerce feature: Were the convictions of the writer of this brief alone to guide him he would go no further than to argue that the Ohio Blue Sky Law, being within the police power of the state and not violative of the Fourteenth Amendment, did not attempt to reach anything the **sale** of which might become a subject of interstate commerce—in other words, he maintains that the sale of certificates representing stocks, or paper writings representing bonds, etc., cannot constitute interstate commerce within the meaning of the Federal Constitution. Being certain in his own mind on these matters, he feels that an explanation is due this court for making any further argument upon any hypothesis which recognizes even for the purpose of argument that the sale of certificates of stock, bonds, etc., may be the subject of interstate commerce. However, several lower courts, mistakenly it is believed, considering the doctrine of Nathan v. Louisiana and Paul v. Virginia overruled by the Lottery Case, have held the sale of such certificates, bonds, etc., to be the subject of interstate commerce. Therefore, the writer feels as the legal representative of the state of Ohio, which is the real party in interest, that it is his duty also to present to this court for its consideration what he believes to be the law should this court hold that the sale of such certificates, etc., is a proper subject of interstate commerce.)

[redacted]

(a) The Ohio Blue Sky Law Is a Reasonable Exercise of the Police Power of the State, Being Designed Merely to Prevent Fraud.

> "But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business."
>
> **Rast v. Van Deman, 240 U. S. 342-365.**

What is the end to be obtained by the "Blue Sky" Law? We maintain that its sole purpose is the prevention of fraud.

Is there any real necessity for such action on the part of the state for the protection of its citizens? That there have been frauds and many of them in the sales of "securities" no one will deny. But some will answer that the fact that there is often fraud in such transactions is not sufficient to justify a supervision over all transactions both good and bad. But let us apply the rule of reason.

Government is established to guarantee to the individual life, liberty and the pursuit of happiness. This does not mean that an individual may do anything he chooses so long as he believes it to be right nor even so long as it is not **malum in se**. The equal rights to life, liberty and the pursuit of happiness guaranteed to individual members of society require that there be certain restrictions upon the actions of individuals and certain duties owing by one individual to another.

Public welfare (i. e., the Greater Good) then becomes the measure of the individual freedom of action or inaction and under the principle of the "greater good" or the "good for the greater number" are established our laws which condemn acts solely **mala prohibita.** If for the public welfare we may prohibit an act not **malum in se,** can there be any question that to the same end acts **mala in se** may be proscribed even though they circumscribe the freedom of contract.

Contracts induced by fraud were just as much denounced at the common law as contracts for monopoly or in restraint of trade. Indeed, as equity in addition to the common law courts was always quick to act and thorough in the relief where fraud was concerned, we may safely assert that so far as enforcement was concerned, fraud was the surer to be condemned.

We now come to the following proposition:

That for the purpose of preventing fraud the state may scrutinize and classify all transactions wherein fraud is known to obtain irrespective of the fact that it is admitted that even the greater part of such transactions are honestly conducted. And while the state may not forbid or unnecessarily hinder the honest transaction, it may subject such honest transaction to the same inspection or supervision as may reasonably be necessary to acertain whether or not they are tainted by fraud.

If the foregoing proposition be not true, then impotent indeed is government. And it is difficult to see how a court of equity, which is the especial scourge of fraud, has the right to interfere by its process to stop the prevention of fraud, unless other and entirely different overpowering considerations of public welfare be present.

That fraud is known to obtain in transactions coming under the "Blue Sky" Law is notorious. That fraud can be prevented or even minimized only by supervision on the part of the state must be apparent upon the slightest reflection as to actual conditions rather than theories.

So complex has business become that whereas a generation ago one might be able to investigate for himself most any concern in which he proposed investing, that today is impossible or at least impracticable on the part of the very large majority of investors. Even granting that the prospective investor were sufficiently trained to investigate for himself the time consumed on one hand and the inconvenience to the company on the other hand would still make individual investigation impracticable. Business itself has recognized this so that it has employed so-called "public accountants" to make statements. The fact remains that these public accountants receive their employment and their compensation from one side only and the further fact that many of them do not go back of the figures presented to them by their employers, make the creation of an impartial examiner not only highly desirable but very necessary.

The opponents of the "Blue Sky" Law are unanimous in claiming that it is good for the community that the savings of individuals be invested in these commercial enterprises. While they claim that the state should assume no guardianship over the investor, they must admit that both parties should have equal opportunity of investigation else the doctrine of **caveat emptor** could not possibly apply. And it is here that we desire to place special emphasis. The investor in non-listed securities or securities about which impartial facts are not readily

obtainable has, because of the inherent impracticability, no opportunity of investigating the statements of the offerer of the securities.

Suppose that some member of this court had one thousand dollars to invest (and I trust that this is not a violent assumption), a seven per cent cumulative, tax-free in Ohio investment might not be unattractive. Unfortunately, with the high cost of living most of our citizens of moderate means feel that to obtain sufficient income to care for their declining days or their widows and orphans they must invest their savings in something that pays a higher rate of interest than United States or municipal bonds. It will be claimed by the agent or broker offering one of these seven per cent cumulative preferred stocks that the security is backed by two dollars of quick assets for every dollar of preferred stock issued; that the company had not and would not incur indebtedness in excess of twenty per cent of its capital; that over a period of years the company's actual earnings had been sufficient not only to care for cumulative dividends on the proposed preferred stock and liberal dividends on all outstanding common stock, but as well to provide a surplus; that no dividends would be paid on common stock unless there remained sufficient to pay two years' dividends on the preferred stock. Now this is a mighty attractive statement and, if true, one might feel willing to risk his money for the promised reward. Possibly the member of this court to whom such an offer was made would recall that "all that glitters is not gold"—that there should be some allowance for "boosting"—salesmanship they call it now, but even he might "fall" for the scheme when shown an alleged public accountant's

audit to back up every statement made by the agent or broker.

Upon the representations made the investor is willing to risk his money. I do not claim that it is the province of the state to require any guarantee against loss, but I do say that it is not only the right but the duty of the state to see to it that the persons making these representations to our citizens for the purpose of obtaining their money shall not make false representations either wilfully or in reckless disregard of the truth. That the only efficient way to perform this service is for the state to supervise and inspect these statements and representations in the first instance rather than relegate the injured person to the institution of criminal prosecutions or the obtaining of uncollectible judgments.

Such action on the part of the state instead of restraining contract will stimulate because it will tend to place the contracting parties on equal footing so that the one parting with his money may deal with the other intelligently—having the knowledge that the representations made to him had been checked up and will continue to be checked up by the state.

As was said by Mr. Justice McKenna in the case of **German Alliance Insurance Co. v. Lewis, 233 U. S. 389-409,** and by us quoted in the opening of this brief:

> "Against that conservatism of mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread

of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

One cannot read the reasoning of the court in this case (which has been reviewed and quoted from in another part of this brief) as well as a number of other cases recently decided by this court, without feeling like apologizing for the necessity of taking up the time of this court with an argument as to whether such laws as the Blue Sky Laws enacted by the various states of this Union are within the police power of the state.

As was said in the report of the **Postmaster General for 1913, p. 97** (also referred to in the opening of this brief):

> "The stock selling proposition appears to appeal to the public more than any other one fraud scheme conducted and the amount of money taken in by promoters operating this class of scheme is enormous."

In the case of **Rast v. Van Deman, 240 U. S. 342**, this court, in the opinion by Mr. Justice McKenna, said (p. 364):

> "It is trite to say that practices harmless of themselves may, from circumstances, become the source of evil or may have evil tendency * * *. There are many lawful restrictions upon liberty of contract and business."

After reviewing various cases this court, in the same case, said (p. 368):

> "Other cases might be cited, and, it may be, of more pertinent application which from their number and instances would seem to have uttered the last necessary word upon the power of the legislature to regulate conduct and contracts, and, in the exercise of the power to classify objects, upon its conception of the public welfare, the right to review to be ex-

erted by the courts only when the legislation is unreasonable or purely arbitrary."

In the case of **Chicago, Burlington & Quincy R. R. Co. v. McGuire, 219 U. S. 549,** it was said by this court in the opinion by Mr. Justice Hughes at page 566:

"It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the constitution. Allgeyer v. Louisiana, 165 U. S. 578; Lochner v. New York, 198 U. S. 45; Adair v. United States, 208 U. S. 161. In Allgeyer v. Louisiana, supra, the court in referring to the Fourteenth Amendment, said (page 589):

'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.'

But it was recognized in the cases cited, as in many others, that freedom of contract is qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

The underlying principle of our government being that the individual convenience must give way to the general welfare; the general welfare demanding the protection of

the small investor from fraudulent representations before he parts with his money; and these terms being established, any law which hampers individual freedom only so far as necessary to protect the individual from actual fraud must be upheld. It was said in the case of **Rast v. Van Deman** (supra):

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * * It is the duty and function of the legislature to discern and correct evils and by evils we do not mean some definite injury but obstacles to a greater public welfare. And, we repeat, 'it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary.'"

The contention made that "legitimate commercial transactions, such as the disposal of securities mentioned in the act cannot be regulated by legislative enactment" has been answered to the contrary so often by the Supreme Court of the United States it is unnecessary to cite further authorities upon that proposition.

Honest business must submit to regulation and inspection in order that dishonest business may be outlawed, prosecuted and punished for its dishonesty. Our criminal laws are not made for the law-abiding, but for the law-avoiding, but the former must submit to them as well as the latter.

An honest man will not fear the Blue Sky Law. A dishonest one should be kept in fear of it. The criminal statutes of Ohio, to wit, the statute against obtaining money by false and fraudulent pretense, the statute on forged instruments and uttering forgeries, and all other

statutes touching the subject of fraud in relation to acquiring property, and providing a criminal penalty for the violation of them, are in some sense an invasion of the right of freedom of interstate commerce. But it would not be seriously contended that they are, therefore, as to interstate commerce transactions unconstitutionally regulated.

Suppose the stock were a forged certificate instead of a bona fide certificate in an absolutely fraudulent corporation, and the forgery took place in Pennsylvania, but it was uttered as a forgery in Ohio; the mere fact that the forged certificate was the subject of interstate commerce could not be invoked as a defense to the statute. And what is the difference between such a forged certificate of stock and one that is palpably and inherently fraudulent? They are of equal value.

Courts have always recognized the right of the state to exercise police powers with reference to certain hazardous lines of business, no matter how essentially honest or private they may be. True as to certain lines of "business affected by public interest," courts have held that where such facts obtained they would **also** be subject to legislative regulation. (In another part of this brief, dealing with the opinion of the court below, we have under that title more fully discussed "property affected with a public interest.")

But it is urged that dealing in bonds, stocks and securities and lands outside of Ohio is not "affected with a public interest". Yet the very life of the corporation that issued the stock was brought forth out of a public franchise. Neither corporation nor stock could have had any existence until the public, through either its consti-

tution or its laws, gave it life. And let it be remembered that the business entity conferred upon the corporation was for honest purposes and not dishonest ones.

License:

The state in the exercise of its police power, notwithstanding the Fourteenth Amendment of the Constitution, has long been accorded the right to levy an occupational tax or assess a license upon persons engaged in certain occupations, though they are dealing in part in articles which have come into the state as interstate commerce.

One of the oldest considered cases is that of **Woodruff v. Parham, 8 Wall. 123, 139.**

In **Welton v. Missouri, 91 U. S. 275,** the court says to the same effect (p. 278):

> "The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the state. * * * The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted."

In **Machine Co. v. Gage, 100 U. S. 676-679,** the same doctrine was announced with reference to a statute of Tennessee imposing a tax on peddlers of sewing machines:

> "It applies alike to sewing machines manufactured in the state and out of it. The exaction is not an unusual one. The state putting all such machines on the same footing with respect to the tax complained of had an unquestionable right to impose the burden."

One of the most carefully considered cases is that of **Emert v. Missouri, 156 U. S. 296.** That case thoroughly

reviews all the authorities upon the subject. The syllabus reads:

> "A statute of a state, by which peddlers of goods, going from place to place within the state to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents or products of the state and those of other states, is not, as to peddlers of goods previously sent to them by manufacturers in other states, repugnant to the grant by the constitution to congress of the power to regulate commerce among the several states."

The peddler in this case was the agent of The Singer Manufacturing Company, well-known manufacturers of sewing machines.

Now, the peddler has for a long time had his calling subject to special license or tax under the exercise of the police power, notwithstanding he dealt in interstate products.

The authorities generally hold in defining a peddler that he "is a small retail dealer who carries his merchandise with him, traveling from place to place or from house to house, exposing his, or his principal's, goods for sale and selling them." 21 Cyc. 367.

The intending purchaser here can at least see the goods, inspect their quantity and quality and know that he is getting what he bought and paid for. In principle at least it would seem that the stock broker, the "dealer" within this state, who furnished simply a piece of printed paper, with a few blanks filled out and signed by what purports to be the officials of some foreign company, should be subject to reasonable regulation by licensing him when his products are honest. The buyer cannot know, except upon the representations of the "dealer" or

his agent or by special examination made with difficulty and expense, what the real value of the paper or stock certificate may be.

When the interstate commerce clause was framed and adopted, interstate commerce was carried on by post, by wagon, flat boat and by stage coach. In the course of time they were supplanted by the railroad, steamship, telegraph and telephone. But the courts have had no difficulty in applying the same principles with such modification as changed circumstances render necessary in order to work out justice. So with the peddler of goods, wares and merchandise and the stock broker, who will say that there is not equal opportunity for fraud and imposition in the sale of the stock certificate as in the sale of peddler's wares? Why should not the same principle of protection be applied to both with a view of safeguarding the public from fraud and plunder?

> "The brokerage business is probably an enterprise exclusively of the state of the broker, and therefore a state may probably control factors and brokers and their business even when negotiating transactions between residents of different states."
> **7 Cyc. 444 and cases cited.**

Inspection:

The Federal Constitution itself, however, furnishes clear and conclusive evidence that the power to enact laws like the Blue Sky Laws was to remain with the several states.

This will plainly appear by an examination of Section 10, in conjunction with Section 8 of Article II of the Federal Constitution. A part of Section 10 is most pertinent

and illuminating upon the contention here made touching interstate commerce:

> "No state shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imposts, laid by any state on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress."

Here is a plain, direct and unequivocal recognition of the right and power of the state, under what is known as its police power, to pass proper inspection laws, and that the same would not be any invasion upon the right of Congress, notwithstanding the fact that such inspection law might indirectly and incidentally affect interstate commerce. The last clause of said Section 10, to wit: "All such laws shall be subject to the revision and control of the Congress" merely provides that Congress may, at its pleasure, intervene and pass uniform regulatory act, in which event the state act would be superseded. But as has already appeared, Congress has not passed any such act.

Now, what is a Blue Sky statute but an inspection law? It matters not that it is not so called in its title, nor the word "inspection" appear in the act, but in substance and effect, in practical operation, that is what it is.

An act must be judged by its substantial provisions, regardless of its designation, and if in fact an inspection law, it will be held such even though designated otherwise.

Standard Stock Food Co. v. Wright, 225 U. S. 540.
Henderson v. Mayor, 92 U. S. 259-268.
Minnesota v. Barber, 136 U. S. 313-319.

If meat, milk and other food products, fertilizer, drugs, cattle, hides, oils and other products, physical and tangible, which may in some measure be inspected by the intending purchaser, may be the subject of state inspection laws within the police power even though some of the products inspected be interstate, it would seem by parity of reason and justice that a piece of paper purporting on its face to represent value of $100 or $1,000 as a stock certificate, entitling the owner, or holder, to its face value of stock in some incorporated company, should be subject to inspection before a "dealer" shall be entitled to market the same among the people of a state.

Inadvertently someone might say that there is nothing about a stock certificate to inspect. This might be granted and still be wide of the mark, for, after all, and no matter how many nisi prius courts may say that they are the subjects of interstate commerce, a stock certificate is no more nor less than a chose in action. It is the representation of an undivided interest in property which remains stationary and is never itself subject to interstate commerce. This is the widest definition that can be given to a share of stock. Probably more properly a share of stock is in turn the representative of a right to participate in the profits or distribution of the assets of a company, or the evidence of a membership in a corporation. Independent of the share in the assets of the company for which it is a receipt or acknowledgment, a stock certificate has no value above waste paper; so with bonds and other securities.

It is impossible, or, if not impossible, impracticable, for the individual citizen to obtain reliable and unprejudiced information about the assets back of the so-called

"**securities**", as well as the reliability of the representations upon which they are offered for sale.

Some of these difficulties, regarding information in respect to **standard stocks,** are exhibited in the case of Virginia v. West Virginia, 238 U. S. 202. Far more difficult, however, and, as above stated, practically impossible, is it for the citizen to find out what assets are back of the certificate of stock in a company alleged to own a gold mine, silver mine, oil well, gas well, etc., as well as many "dreams" which are financed under the head of "industrial corporations" to develop some patent or to take over some tottering business that has not been able, in the ordinary course of its business, to secure funds enough on which to keep going.

In the case of **Robbins v. Taxing Dist. of Shelby Co., 120 U. S. 489,** this court, by Mr. Justice Bradley, said (p. 493):

> "It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is when * * * the passage of inspection laws to secure the due quality and **measure** of products and commodities."

If it be held that stock certificates are such subjects of interstate commerce as may not be regulated otherwise by the states, surely then an inspection law which seeks to see whether the **measure** of assets exists in the other state where located must be upheld.

An act passed under the police power to protect the people against fraud or wrong does not offend against the commerce clause of the Federal Constitution because commerce among the states is incidentally affected.

Plumley v. Mass., 155 U. S. 461.
Crossman v. Lurman, 192 U. S. 189.

One of the earliest and most celebrated cases dealing with inspection laws is **Gibbons v. Ogden, 9 Wheat. 1 and 203**:

> "That inspection laws may have remote and considerable influence on commerce will not be denied, but that the power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. * * * They form a portion of that immense mass of legislation which embraces everything within the territory of the state and not surrendered to the general government, all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws and health laws of every description, etc., are component parts of the mass. No direct general power over these subjects is granted to Congress, and consequently they remain subjects of state legislation."

To same effect are the following:

Patterson v. Kentucky, 97 U. S. 501, which related to inspection of oils and fluids, used for illuminating purposes.

Turner v. Maryland, 107 U. S. 38.

A most careful and fully considered case is found in **Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345.**

In the latter case it was held that inspection laws are valid when they act on a subject before it becomes an article of commerce and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self protection commonly called the police power, and that interstate as well as foreign commerce is subject to a state inspection law.

The opinion in this last case was delivered by Chief Justice Fuller.

In one of the earliest cases, **Neilson v. Garza, 2 Woods 287-289,** Justice Bradley delivered the opinion, part of which is as follows:

> "If the state law of Texas which is complained of is really an inspection law it is valid and binding unless it interferes with the power of Congress to regulate commerce, and if it does thus interfere it may still be valid and binding until revised and altered by Congress. The right to make inspection laws is not granted to Congress but reserved to the states and is subject to the permanent right of Congress to regulate commerce of foreign nations and among the several states."

An important case involving the inspection power of the state or territory is **Territory of New Mexico ex rel. v. Denver & Rio Grande R. R. Co., 203 U. S. 38,** Mr. Justice Day delivered the opinion, and it was held that a prohibition against the receipt by common carriers for transportation beyond the limits of the territory of hides which did not bear the evidence of inspection required by N. M. act of March 19, 1901, was a valid exercise of the police power, and did not—**there being no congressional legislation covering the subject and making a different provision**—violate the commerce clause of the Federal Constitution, althought hides not offered for transportation were not required to be inspected after thirty days in slaughter houses, and not at all outside of the slaughter houses, and although the incidental effect of the statute might be to levy a tax upon the class of property.

Upon this proposition this legislation of the state on Blue Sky Laws should stand, under the decisions of the

Supreme Court of the United States by reason of the fact that there is no congressional legislation covering the subject making a different provision and that the interstate commerce regulation, if there is such at all, is only incidental and remote. A very recent case decided in 1915 by the Supreme Court of the United States is illuminating.

Sligh v. Kirkwood, 237 U. S. 52, decided in 1915, in which Mr. Justice Day delivering the opinion says (p. 58):

> "The contention of the plaintiff in error is that the statute contravenes the Federal Constitution in that the legislature has undertaken to pass a law beyond the power of the state, because of the exclusive control of Congress over commerce among the states, under the Federal Constitution.
>
> "That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the state, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that **there may be legitimate action** by the state in the matter of local regulation, which the state may take **until Congress exercises its authority upon the subject.**"
>
> (Blackface ours.)

Mr. Justice Day in the same opinion discusses at some length the police power of the state as follows (p. 58):

> "The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether

> it related to the rights of persons or property of the public or any individual in the state. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27. * * *
>
> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. **Such articles, it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the constitution.**"
>
> (Blackface ours.)

If bad foods are not legitimate articles of commerce, what shall be said of fraudulent stocks constituted chiefly of wind and water?

Mr. Justice Day, continuing, says:

> "Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state."
>
> "Furthermore, this regulation cannot be declared invalid if within the range of the police power unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation. * * * Until Congress does legislate upon the subject, the state is free to enter the field."

Applying these various tests specified in the foregoing decisions, we ask the question, is the Blue Sky Law of Ohio a lawful exercise of the police power of the state of

Ohio, notwithstanding the fact that it may remotely and incidentally regulate interstate commerce, Congress in the meanwhile not having legislated upon the subject?

The first question to be determined is this, is there a "reasonable relation to an object within the governmental authority?" If so, "the exercise of the legislative discretion is not subject to judicial review." **McLean v. Arkansas,** 211 U. S. 539, opinion by Mr. Justice Hughes. To the same effect **Lindsley Case,** supra.

Can it be doubted that the prevention of frauds in the sale of bonds, stocks and securities is "within the governmental authority?"

The state government has provided against frauds in other commodities, why not in stocks?

Who shall be the judge as to whether or not it bears such "reasonable relation"? Mr. Justice Hughes answers this question in the **McLean Case,** supra:

> "The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

Another consideration courts give to legislation of this character in determining whether or not it is a purely arbitrary or eccentric act of discriminating legislation is the question as to whether or not the legislation responds to

> "a deep-seated conviction on the part of the people concerned as to what that policy required. **Such a deep-seated conviction is entitled to great respect.**

If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.' "

(Blackface ours.)

Otis v. Parker, 187 U. S. 606.
Opinion by Mr. Justice Holmes.

"That a deep-seated conviction on the part of the people concerned" is stamped upon the Blue Sky Law, there can be no doubt. That for years there has been a considerable number of brokerage firms and corporations, whose sole and chief business was to deal in, sell and exchange corporate bonds, stocks and other securities with branches or agencies in almost every county of the state, there also is no doubt. That said brokerage firms and corporations are highly organized and successful and efficient in the sale and disposition of bonds, stocks and securities; that there have also been large sales of lands outside of Ohio, especially in the South and the West that were comparatively worthless, there can be no doubt.

The result of transactions along these two lines has caused large losses to the saving and thrifty people of the state of Ohio through fraudulent stocks and worthless lands. Thereupon there was vigorous demand made upon the constitutional convention of 1912 to formulate an amendment to the Ohio constitution that would authorize appropriate state legislation to meet this widespread and growing iniquity in the sale of fraudulent stocks and worthless foreign lands. That amendment was ratified by a vote of the people by a majority of

88,000 votes. The first legislature of Ohio convening after the adoption of said amendment by an overwhelming vote passed the statute in question, and the banking department of the state has been reorganized with a view of administering and enforcing the provisions of this act. Moreover, more than twenty other states, in response to the same popular demand, have enacted similar statutes for the protection of the people against frauds by the "stock peddler".

It would, therefore, appear that the act in question does bear a "reasonable relation to an object within the governmental authority", and that the act is in response to a well settled conviction of the people.

It, therefore, appears that the general purpose of the act is within the police powers of the state; that at most, if there be any regulation of interstate commerce, it is incidental and remote, and, therefore, does not offend against the interstate commerce; especially by reason of the fact that Congress has not legislated in the field of regulating the sale of fraudulent bonds, stocks and other securities.

(b). **The Ohio Blue Sky Law in No Wise Contravenes the Fourteenth Amendment.**

1. **Due Process.**

It is claimed that the act is a wrongful deprivation of property "without due process of law" and the "equal protection of the laws" in violation of the **Fourteenth Amendment to the federal constitution.**

The pertinent part of that amendment is as follows:

> "* * * Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There was nothing magical or novel about these clauses. Their fundamental base was in the old Magna Charta. The first clause "due process of law" was in the Fifth Amendment to the constitution and had been a part of the organic law of the nation since 1789. The language of that amendment was nor shall any person "be deprived of life, liberty or property without due process of law."

And during the first century of our national government only one statute was declared unconstitutional as violative of this clause as it appeared in the Fifth Amendment.

What is meant by the phrase "due process of law" as construed by the courts?

Probably a few of the most satisfactory definitions are given below:

In **Hurtado v. California, 110 U. S. 516,** it was held (p. 537):

> "Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves the principles of liberty and justice, must be held to be due process of law."

In **Weimer v. Bunbury, 30 Mich. 201,** Judge Cooley says (p. 211):

> "Due process of law does not necessarily imply judicial process. Much of the process by means of

which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress."

The Supreme Court of the United States in 194 U. S. 497-508, **Public Clearing House v. Coyne,** said:

> "It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. That due process of law does not necessarily require the interference of the judicial power as laid down in many cases and by many eminent writers upon the subject of constitutional limitations."

See also Watson on the Constitution, Vol. 2, p. 1431, where the Fifth Amendment is ably and painstakingly discussed particularly with reference to "due process of law."

While the "due process" clause of the Fourteenth Amendment has been so often and so elaborately considered, it will not be amiss to return to the language of the amendment itself.

The very language of the amendment shows that the government **has** the right to deprive any person of property, but that the same must be done by "due process of law."

"Due process of law" where, under what jurisdiction? Evidently if the deprivation shall take place by national law, the test must be there. If it shall take place under state law, the test must be there.

The Ohio constitution of 1802, Article 8, Section 4, provided "private property ought and shall ever be held inviolate, but always subservient to the public welfare," etc. The Ohio constitution of 1851 contains substantially the same provision in Article 1, Section 19, bill of rights: "Private property shall ever be held inviolate but subservient to the public welfare." This section was unchanged by the amendments of 1912.

The Ohio idea seems to be, not that private property shall be above the public welfare, but that the public welfare shall be above private property.

Now, it is claimed that this statute violates the due process clause of the Fourteenth Amendment of the federal constitution in that it is a deprivation of property without "due process of law."

What provision is made in the blue sky law of Ohio for hearing and determination touching the rights of dealers in stocks and securities?

By Section 6373-3, General Code, an application accompanied by a five dollar fee shall be filed with the superintendent of banks, together with certain information in such form as shall be determined by the commissioner.

By Section 6373, Subdivision 8, if the license be refused or revoked the applicant may file within 30 days thereafter in the Court of Common Pleas of Franklin county, being the county that includes the capital city of the state, a petition against the commissioner alleging therein in brief detail the plaintiff's qualifications to be

licensed and praying for a reversal of the official action complained of.

"The court's decision shall consult only the rights of the plaintiff and the protection of the public." The action of the court is final only against the state, but the plaintiff, a "dealer or issuer," may prosecute error as in other civil cases.

What more should be required in order to conform to the language "due process of law"? The fundamental doctrine of all litigation in Ohio in the determination of all legal and administrative questions is one hearing or trial and one **appeal** or review, and clearly the provisions of the blue sky law, which go even further in these respects, is "due process of law" as understood and adopted in Ohio.

Much was made in argument and in the opinion of the court as to the discretion vested in the commissioner. In the discussion of the opinion of the court below under the heading of "Due Process," we have discussed that feature and cited authorities amply sustaining the law. Outside of calling attention here again to the fact that by the amendment of Section 2 of Article XIII of the constitution of Ohio provision was specifically made authorizing the conferring upon boards, commissioners or officers such supervisory and regulatory powers over the organization of corporation, their business and issue and sale of stocks and securities, and over the business and sale of securities of foreign corporations and joint stock companies, and the further fact that the Ohio blue sky law provides for a speedy appeal to the courts from the rulings of the commissioner (General Code of Ohio, 6373-8) as well as to the fact that the Supreme Court of

Ohio had sustained analogous provisions of other laws prior to said constitutional amendment, we respectfully refer the court to the earlier part of this brief to be found in the division "Argument—C-1—Reasoning of the Court —Due Process."

2. **Classification.**

Further it is urged that the provisions of the blue sky law violate the "equal protection of the laws" clause of the Fourteenth Amendment, even though it be generally within the police power of the state.

Generally speaking it is impractical to draft a statute with mathematical exactness that shall apply equally to all persons and all things in the same manner and to the same degree, and, therefore, legislative bodies endeavor to work out justice through classifications and it is upon these classifications generally that the claim of discrimination is made.

In the recent **Trading Stamp** Case from Florida, Justice McKenna lays down the long established rule:

> "It is established that a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."

Quoting Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, he further says:

> "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549; German Alliance Ins. Co. v. Lewis, 233 U. S. 389; Price v. Illinois, 238 U. S. 446."

In the **Lindsley case,** supra, Judge Van Devanter discussing this question said:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36; Louisville & N. R. Co. v. Melton, 218 U. S. 36."

On this same subject of classification Justice McKenna in the case of **German Alliance Ins. Co. v. Lewis, 233 U. S. 389,** uses this language:

> "The legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear and even degrees of evil may determine its exercise."

Justice Holmes speaks to the same effect in **Central Lumber Co. v. South Dakota, 226 U. S. 157:**

One of the contentions made in this case was that it was partial and discriminatory legislation and violates the equal protection clause of the Fourteenth Amendment for two reasons:

1. Because it attempts to make certain acts an offense when committed by one class of persons, and no offense when committed by other classes.

2. Because it is not the exercise of the so-called police power for the benefit of the public generally, but only for the benefit of a particular and limited class, to wit, the "regular established dealer."

Mr. Justice Holmes says (p. 159):

> "The subject matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts, as alleged, with the constitution of the United States. The grounds on which it is said to do so are that it denies the equal protection of the laws, but it affects the conduct of only a particular class,—those selling goods in two places in the state,—and is intended for the protection of only a particular class,—regular established dealers; and also because it unreasonably limits the liberty of people to make such bargains as they like.
>
> "On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the acts constituting the offense, and it is urged that to punish selling goods in one place lower than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists **without covering the whole field of possible abuses,** and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; Missouri P. & R. Co. v. Mackey, 127 U. S. 205."

A very interesting case dealing with stock transactions known as "futures" and announcing the same general principle is **Otis v. Parker, 187 U. S. 606.**

In that case it was held that no unconstitutional interference with the right of contract was made by Cal. Const. Art. 4, Sec. 26, avoiding all contracts for sales of shares of corporate stock on margin, and providing for the recovery of any money paid on such contracts, although this provision might be construed to apply to **bona fide as well as gambling contracts,** and that the equal protection of the laws was not denied by Cal. Const. Art. 4, Sec. 26, avoiding all contracts for the sale of shares of corporate stock on margin, because that provision struck only at some, and not all, objects of possible speculation.

Mr. Justice Holmes in the opinion, among other things, says (p. 608):

> "It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws.
>
> Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.

> Even if the provisions before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what the policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere.
>
> With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. * * * Stock is convenient for purposes of speculation, because of the ease with which it is transferred from hand to hand, as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no farther in what they forbade. * * * We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws."

The exclusion of certain transactions and certain persons conducting the transactions and certain classes of bonds, stocks and securities are based upon reasonable legal and constitutional classifications. In short, upon the degree of risk and hazard as developed out of the experience of our own people, as well as the bona fides and reliability of certain business corporations, such as national banks and certain stocks, such as are regularly quoted on stock exchange, and the like, that are recognized as sound and bona fide in honest business and among worthy business men.

In the discussion of the "Reasoning of the Court—Classification" (supra) we have collated the various authorities upon classification under the Fourteenth Amendment.

(c). The Blue Sky Law Is in No Wise an Interference With Interstate Commerce.

1. The Law Simply Attempts to Regulate Sales Within the State of Ohio by Persons Within the State and to Persons Within the State.

In the first section of the blue sky law—**6373-1, General Code of Ohio**—it is provided:

> "No dealer shall **within this state** dispose or offer to dispose of any stock, stock certificates, bonds, debentures, * * * without first being licensed so to do as hereinafter provided."

This provision of the statute clearly indicates that the license is required only of "dealers," and that that "dealer" must, at the time he is engaged in the sale, be "within this state," in order to be subject to the license or the law.

Again in the following section, Subdivision 3, the statute defines the term "dealer" as follows:

> "The term 'dealer,' as used in this act, shall be deemed to include **any** person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters, or any stock promotion scheme whatsoever, except."

It will be observed that any person outside of the state may sell to any person within the state, or any person within the state may buy of any person outside of the state any stock of domestic or foreign corporations free from the statute. From the whole statute it is quite evident that the license is upon the "business of dealing" in bonds, stocks and securities and not upon any single isolated transaction. **The shipment is not taxed or regulated.**

As was said by Mr. Justice Holmes in the case of **New York v. Reardon,** 204 U. S. 152-159:

> "Whatever the right of parties engaged in commerce among the states, a sale depends in part upon the law of the state where it takes place, for its validity."

In the light of two very recent cases decided by the Supreme Court of the United States, March 6, 1916, there can be little doubt left that the transactions affected by the blue sky law of Ohio are essentially only intrastate.

Rast, etc., v. Van Deman & Lewis Co. et al., 240 U. S. 342.
Tanner, etc., v. Little et al., 240 U. S. 369.

In the Florida case, supra, the questions arose over a trading stamp scheme, to prohibit which the legislature of the state of Florida passed a statute providing that:

> "Each and every person, firm or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a state license tax of five hundred ($500) dollars and a county license tax of two hundred and fifty ($250) dollars in each and every county in which said business is conducted or carried on," etc.

On the question of whether or not the trading stamp scheme or transaction was in the nature of interstate commerce, Mr. Justice McKenna, speaking for the court, says (p. 360):

> "With this comment we may say that all of the schemes have a common character—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase—something of value given other than it; and even as to the second and third schemes the transactions are only executed through the purchase at retail. In other words, they are not designed for or executed through a sale of the original package of importation, but in the packages of retail and sale to the individual purchaser and consumer. This fixes their character as transactions within the state, and not as transactions in interstate commerce, and this is conceded as to the first scheme; it is true as to the second and third schemes. All of the schemes have their influence and effect within the state. Nor is such influence and effect changed or lessened by the redemption of the tokens outside of the state.
>
> The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce; they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the state nor their disposition in the packages of importation. Of course, there is shipment to Florida merchants, but for the disposition of the merchandise in retail trade. The schemes contemplate such disposition and are executed by it. * * * This, we repeat, has no protection in the commerce clause."

In the light of principle, the transactions affected by the statute are not within the interstate commerce provision of the federal constitution.

2. That Which Is Not Capable of Transportation Cannot Become the Subject of Interstate Commerce. Certificates of Stock Being Mere Muniments of Title to Property Permanently Located in One State, and Bonds and Securities, Being Mere Choses in Action Giving Rise to Rights of Action, May Not Be the Subjects of Interstate Commerce.

The real question to be discussed is not

> Are shares of stock and bonds subjects of interstate commerce?

but—

> Is the sale within a state of a share of stock or a bond of a corporation, domestic or foreign, an interstate commerce transaction when the **certificate** of stock or the **paper writing** constituting the tangible evidence of the obligation embodied in the bond may or must, in order that the transaction as carried on in the usual way may be completed, be delivered to the purchaser from a point outside the state—i. e., when the actual certificates and bonds are not in the state and in the possession of the seller at the time the contract was made—interstate commerce?

The first thing to be determined is what is a **stock certificate?**

We must bear in mind that there is a distinction between a share of stock and the **certificate** which represents it, just as there is a distinction between a shipment and a bill of lading which represents it. A certificate of stock is no more a share of stock than a bill of lading for a car of coal is the coal. One may be the owner of a share of corporate stock without possession of a certificate. But the possession or even the ownership of a

certificate without ownership of the share of stock amounts to nothing.

The language of the Supreme Court of Ohio by Crew, judge in the case of **Ball and The American Exchange Bank, et al. v. The Towle Manufacturing Co., 67 O. S. 306,** illustrates this. At page 314 the court said:

> "There is a marked and obvious distinction between the **stock** of a corporation and the **certificate** representing such stock. The certificate of shares of stock in a corporation is not the stock itself, but is a mere evidence of the stockholders' interest in the corporate property of the corporation which issues said certificate. Cook on Stocks and Stockholders, Section 485. In the absence of statutory or charter requirements no certificate of stock is necessary to attest the rights of the shareholder in the corporation, and such certificate when issued to the owner of shares of stock is merely an evidence or acknowledgment of the owner's interest in the property of the corporation, but is not the property itself. In law a corporation is the trustee of the corporate property and holds the same for the benefit of the stockholders; and so long as such corporation continues to have a legal existence and to carry on the business for which it was created it alone is the proper custodian, and has possession of the corporate property. In Cook on Stocks and Stockholders, Section 480, the author says:
>
> 'It has been held that if a stockholder whose stock has already been attached or sold on execution sells his certificate of stock after the levy of such attachment or execution, the vendee or transferee buys subject to such a levy, even though he had no knowledge of it. The stock in contemplation of law has already been seized by the levy, and the purchaser is bound to take notice of that fact. The only means of avoiding this danger in the purchase of stock is by an inquiry at the office of the corporation at the time of making the purchase.'

In Railroad Co. v. Paine & Co., 29 Gratt. Rep. (Va.), 502, it was sought by attachment and garni-

shee process to reach and subject fifteen shares of stock belonging to one Trice, who was a stockholder in the plaintiff corporation, to the payment of a debt owing by said Trice to defendant, Paine & Co. The court in that case, page 506, says: 'Shares of a stockholder are such estate as is liable to be attached in a proceeding instituted for that purpose by one of his creditors * * * and such estate may properly be considered for the purpose of such proceeding as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as garnishee in the case.' So in the case at bar, while the certificate for said ten shares of stock was, at the time of the commencement of the proceedings in aid of execution by The Towle Manufacturing Co., and at the time of the service of notice on the bank, in the hands of Webb C. Ball, the judgment debtor, yet the actual property, the stock itself, which such certificate represented, was then in the possession of the bank, and being in the possession of the bank, by force of the provisions of Section 5475, such property was bound from the time the notice was served on said bank, and by the service of said notice The Towle Manufacturing Co. acquired a valid lien thereon which it may enforce by a judicial sale of said stock. The Circuit Court having so found and adjudged, its judgment is affirmed."

The foregoing doctrine was followed and approved in the case of **State v. Davis, 85 O. S. 43**, in which case the court said by Davis, J. (p. 56):

"As we advance in the consideration of this matter it is necessary to keep in view the well marked distinction between shares in the capital stock in a corporation and the certificates issued therefor. The shares are the substance. The certificates are the evidence of things not seen. The shares are actual property of the stockholder. The certificates are the mere attestation of the stockholder's ownership of the shares. The certificates are no more actual property than a man's deed is his farm. They are no

more than an admission on the part of the corporation that the person to whom they were issued has, **pro tanto**, performed his part of the contract in becoming a stockholder. They are not negotiable; and even a **bona fide** purchaser of certificates of stock acquires no title as against equities existing against the vendor.

Substantially this view of the relation of certificates to shares of capital stock was adopted by the court in Ball et al. v. The Towle Mfg. Co., 67 O. S. 306."

In the case of **Citizens Savings & Trust Co. v. Illinois Central Railway Co., 205 U. S. 46,** Mr. Justice Harlan said (page 57):

"The certificates are only evidence of the ownership of shares and the interest represented by the shares is held by the company for the benefit of the true owner."

This court has held that a tax upon a bill of lading representing a **shipment** is a burden upon interstate commerce. Why? Because the shipment which the bill of lading represented was interstate commerce (Almy v. California, 24 How. 169).

This court has held that the business of a manufacturing plant, whose manufactured articles go into commerce, is not commerce—that commerce succeeds manufacture and is not a part of it and that the relation of the manufacture in such cases to interstate commerce and foreign commerce is incidental and indirect and the business therefore subject only to state control.

Kidd v. Pearson, 128 U. S. 1.
U. S. v. Knight, 156 U. S. 1.

If the manufacturing **business** and **plant** of even a corporation engaged in interstate commerce is not interstate commerce it must needs follow that a membership in such corporation or a share of stock in such corporation is not interstate commerce.

Let us test the proposition by some of the results that would flow from holding the certificates of corporate stock, bonds, promissory notes, bills, etc., interstate commerce.

As was said by Mr. Justice McKenna speaking for this court in the case of **New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495-509:**

> "We have already pointed out that if insurance is commerce and becomes interstate commerce, whenever it is between citizens of different states, **then all control of it is taken from the states.**" (Black face ours.)

Time and again this court has said the same thing in substance where various subjects of interstate commerce were concerned.

If a certificate of membership in or title to a share of stock in a corporation be held a subject of interstate commerce in the manner contended for by the opponents of the blue sky law, then if a share of stock in an Ohio corporation is sold by a citizen of Ohio, while in Ohio, to a citizen of Pennsylvania, while in Pennsylvania, and there follows a transportation of the certificate representing this share of stock, and there then arises the question of the transfer of the share of stock on the books of the Ohio corporation and the state of Ohio were to enact a transfer tax and provide that a transfer of corporate stock in an Ohio corporation would not be valid unless

the tax were paid, would such legislation be valid? The answer, under the assumption that the share of stock is interstate commerce, would be no. And if no tax could be laid upon the transfer, could **any** regulation be made? Again the answer must, under such circumstances, be no, for under the many decisions of this court if a thing is the subject of interstate commerce and becomes interstate commerce then all control over it as interstate commerce is taken from the state. We would then have the ridiculous situation that the state, which by its laws had created a corporation, could no longer control it if by chance one of its stockholders should sell his shares of stock to a citizen of another state, making the transaction interstate commerce.

Which law would govern the rights of the member or stockholder if his share in the corporation were interstate commerce? If the shares of stock or a membership in a corporation become the subjects of interstate commerce then the corporation becomes the subject of interstate commerce for the corporation is a mere component or aggregation of its shareholders or members.

In the course of the opinion in the case of **New York Life Insurance Co. v. Deer Lodge County** (supra) Mr. Justice McKenna, after saying (p. 509):

> "Nor again, does the use of the mails determine anything";

said (p. 510):

> "That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another, to paraphrase Paul v. Virginia. Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its

transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails."

No one can possibly question the statement that there is nothing more immobile than real estate. Suppose, then, we have a corporation formed for the purpose of owning and holding real estate, or owning and operating an office building or warehouse (as may be done in Ohio), may the shares of stock of such a corporation become the subject of interstate commerce? Certainly there is nothing about the business of such a corporation that may become the subject of interstate commerce. It cannot transport its real estate. A gold mine, coal mine, copper mine or any other kind of a mine is nothing but real estate. So, too, an oil well or a gas well. True, after the ore, coal, oil or gas are separated the products of the mine or well may become the subjects of interstate commerce, but may the shares of stock or ownership become such interstate commerce?

In what court and under what law—state or federal—will the corporation be wound up if its shares, or some of them, have been sold in interstate commerce?

If shares of corporate stock are interstate commerce, of course corporate bonds would be. Bonds are simply obligations to pay money, usually secured by a mortgage—nothing more nor less than a contract. The lending of money by the citizen of one state to the citizen of another state, even though all the negotiations be carried on by mail and the money and note delivered to the respective parties, the transaction is not interstate commerce. Purchasing a bond is nothing more than loaning

the company money and the bond is mere evidence of the company's indebtedness.

If shares of corporate stock are interstate commerce, surely bills of exchange and promissory notes are. If they are, what becomes of the negotiable instrument acts of the various states?

As was said by the court in the case of **Nathan v. Louisiana,** and still applies (p. 82):

> "In determining on the nature and effect of a contract, we look to the **lex loci** where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the states have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different states. These laws, in various forms and in numerous cases, have been sanctioned by this court. Indorsers on a protested bill are held responsible for damages, under the law of the state where the indorsement was made. Every indorsement on a bill is a new contract, governed by the local law. Story's Conflict of Laws, 314."

By what law would the maker be bound? By the law of the state if his note was not sold in interstate commerce and by the laws of congress if it were? If the maker lived in one state and the endorser in another, would the respective **lex loci** govern, or would not this be within the exclusive jurisdiction of congress?

If a share of corporate stock may be interstate commerce when represented by a certificate, then certainly a warehouse receipt, which is to the goods stored what a bill of lading is to the goods in transit, is a subject of interstate commerce. What then becomes of the ware-

house laws of the various states? May congress act? These questions and hundreds more that might be asked are pertinent.

Pertinent, too, is the question of what would become of the Tenth Amendment in respect to **all** commercial transactions (and that is a very wide term) that happened to be carried on through the mail between citizens of different states. Would not the courts have amended the amendment which provides:

> "The powers not delegated to the United States by the constitution nor prohibited by it to the states, are reserved to the state respectively, or to the people."

Both the people by their amendment of Section 2 of Article XIII of the constitution of Ohio in 1912 and the state through its legislature in 1913-1914-1915 assumed that the passage of the blue sky law was not within the powers delegated to congress, but was within the powers reserved to the state and to the people.

In the case of **New York Life Insurance Co. v. Deer Lodge Co. (231 U. S. 506)** it was said:

> "It was pointed out that if the power to regulate interstate commerce applied to all the incidents of such commerce and 'to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature."

It may be useful to determine

What is a "commodity" within the meaning of the principle contended for with respect to the interstate commerce question involved in these blue sky cases?

A commodity, for the purpose of the rule which characterizes as interstate commerce the sale within the state of the commodity which at the time of the sale is in another state, and in pursuance thereof must be transported to the state of sale, is a thing the physical destruction of which, after its receipt by the vendee, will cause a loss to the vendee of the thing for which he bargained.

If I buy, through a soliciting agent, a ream of paper which is to come from another state, and after the paper arrives and is delivered to me, and before it is consumed, it is destroyed by fire, there is the end of the matter so far as I am concerned.

If I contract with the Scranton Correspondence Schools (International Text Book Company) for the sending to me, from Scranton, Pa., by the United States mails or by express, of books and printed instructions, etc., and, after receiving the books and the printed instructions, lose them by accident or otherwise, I have no further claim with respect to such books or instructions, upon the Scranton Correspondence Schools.

But if I deal with a resident of Ohio or a non-resident who is in the state in the capacity of a solicitor, for a contract of insurance with a foreign insurance company, and in pursuance of our dealings a policy is sent by mail to me from outside the state and the policy burns up, my substantial rights, in the event of a loss under the contract, remain unchanged.

So also, if I buy a bill of exchange which in pursuance of the agreement which I make with the seller is forwarded to me in the mails from a point without the state and after receiving the bill it is burned, the substantive

right represented by the bill is unaffected, though my remedy for the enforcement of my right may be affected.

So also, with respect to bonds, corporate or otherwise, if I am the owner of a bond, no matter how I acquired it, I have lost nothing but the evidence of the real thing which I have acquired, if it is destroyed while in my possession.

So also, with respect to a certificate of stock. I am none the less a stockholder if my certificate is destroyed. I have the right to have another one issued in its stead. It makes no difference that the certificate may have an independent value of its own.

In short, then, the test above laid down serves to make clear the distinction between Nathan v. Louisiana, etc., on one side, and either the Lottery Case or Robbins v. Shelby County Taxing District, etc., on the other side. In a former part of this brief we have, under the heading of "The Lottery Case on One Hand and Nathan v. Louisiana and Paul v. Virginia on the Other Hand, Distinguished," attempted to point out the distinction between the principles involved in the Lottery Case and those in Nathan v. Louisiana and Paul v. Virginia. (Our inclination is to reprint the same argument under this heading for the convenience of the court, but the size to which this brief has grown forbids and we respectfully direct attention to that argument under the above heading.)

In so far as sales within a state can take on an interstate commercial aspect, they must relate to commodities as such, and not to mere evidences of independent, incorporeal rights, however intrinsically valuable such evidences may be.

Has the intrinsic value of a certificate of stock the same value as the share of stock it represents? Manifestly not, for a loss or destruction of the certificate is not only not a destruction of the share of stock, but not the slightest diminution of it. Of course, the loss or destruction of the certificate causes some inconvenience and usually expense to the owner of the stock. Therefore, the certificate may be said to have a value of its own separate and apart from the share it represents, just as a note or mortgage on account of their probative value may have a value separate and apart from the claim. But look at it as we will, the certificate is not the stock. The note or mortgage is not the debt. The first is the **evidence** of the ownership of a share or membership in a corporation—the right to participate in its profits or distribution of assets—the other two are mere evidences of the debt of some person, firm or corporation.

Insurance policies have a value. As was shown in the case of **New York Life Insurance Co. v. Deer Lodge Co., 231 U. S. 495-499,** insurance policies are

> "subject to sale, assignment and transfer, and are used for collateral security and other commercial purposes, and are valuable for such purposes and for other general purposes of trade and commerce."

A certificate evidencing the ownership of shares of corporate stock or corporate membership is not a commodity—it is neither persons, goods nor information—it is a mere muniment of title just as the possession of a deed evidences the title to real estate.

3. Even Assuming That the Blue Sky Law May Be a Regulation of Interstate Commerce, the Provisions of the Law Do Not Conflict With the Power Delegated to Congress by What Is Known as the Interstate Commerce Clause.

Blackstone more than a century ago announced a fundamental rule for the interpretation of constitutions and statutes that by common consent has never been improved upon.

1. What was the old law?
2. What were its mischiefs that suggested a new law?
3. The remedies provided for these mischiefs by the new law.

It is a matter of common knowledge that under the articles of confederation, which constituted our national organic law up to 1789, that the several states exercised the power of regulating foreign and interstate commerce and that the great diversity of laws discriminating for and against various states in favor of and against each other and various foreign countries had seriously handicapped and embarrassed the growth and development of our national trade and commerce. Confronted with such a situation, our national constitutional convention met in Philadelphia and began the work of formulating a new constitution for the United States of America.

In interpreting their work especially with reference to the interstate commerce clause, it will be well to apply some of the primary rules of interpretation, chief among

which is one early laid down by Chief Justice Marshall, when he said:

> "As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction."

Applying this principle, it is significant to observe that the language of the constitution touching the interstate commerce clause does not use the words "sole and exclusive" power, or words of similar import in conferring power upon congress to regulate the same.

And indeed the Supreme Court of the United States in interpreting this amendment has in effect frequently so held.

In **Cooley v. Board of Wardens of Philadelphia, 12 How. 299,** it was held:

> "That the grant of commercial power to congress did not forbid the states from passing certain laws regulating pilotage, that the grant of the power to congress to regulate commerce included various subjects and that upon some of these subjects the rule should be uniform, but upon others there should be different rules in different states. This ruling was affirmed in Ex Parte McNeil, 13 Wall. 236, where Mr. Justice Swayne said (p. 240): 'In the complex system of policy which prevailed in this country, the powers of government may be divided into four classes. 1. Those which belong exclusively to the states. 2. Those which belong exclusively to

the national government. 3. Those which may be exercised concurrently and independently by both. 4. Those which may be exercised by the states, but only until congress shall see fit to act upon the subject. The authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur. * * * The commercial power lodged by the constitution in congress is, in part, of this character. Some of the rules prescribed in the exercise of that power must, from the very nature of things, be uniform throughout the country. To that extent the power itself must, necessarily, be exclusive; * * * other powers may well vary with the varying circumstances of different localities. In the latter contingency the states may prescribe the rules to be observed until congress shall supersede them."

Justice Curtis in a concurring opinion voices the same sentiment in these words:

"The grant of commercial power to congress does not contain any terms which expressly exclude the states from exercising an authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to congress, requires that a similar authority should not exist in the states."

Mr. Justice Field in a later case, **Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196-204,** announces the same doctrine

"While with reference to some of them (conditions upon which interstate commerce shall be conducted) which are local and limited in their nature or sphere of operations, the states may prescribe regulations until congress intervenes and assumes control of them; yet when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of congress is **exclusive.**"

Chief Justice Waite in **Hall v. DeCuir, 95 U. S. 485-487,** uses the following language:

"There can be no doubt but that exclusive power has been conferred upon congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution.'

"A state might regulate the charges of public warehouses and of railroads situated entirely within the state, even though those engaged in commerce among the states might sometimes use the warehouses or the railroads in the prosecution of their business. So, too, it has been held that states may authorize the construction of dams and bridges across navigable streams situated entirely within their respective jurisdictions. The same is true of turnpikes, and ferries. By such statutes the states regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. * * * When congress does act the state laws are superseded only to the extent that they affect commerce outside a state as it comes within the state. * * *

"But we think it may safely be said, that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress."

Mr. Justice Day in **Field v. Barber, 194 U. S. 618-623,** announces substantially the same doctrine when he says:

"In this day of multiplied means of intercourse between the states there is scarcely any contract which cannot in a limited or remote degree be said

to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of federal legislation."

In a later case known as the **Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352-399,** Mr. Justice Hughes says:

> "It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of congress is exclusive. In other matters, admitting of diversity of treatment according to special requirements of local conditions, the states may act within their respective jurisdictions until congress sees fit to act."

From the foregoing cases the following propositions clearly and conclusively appear:

First: That the constitution did not vest in congress the "sole and exclusive" power to regulate commerce, else the constitutional grant would have so expressly provided.

Second: That where the character and purpose of the regulation is inherently national the regulation is exclusively for congress.

Third: That in all other respects save in certain particulars where it is denied to the states, the power to regulate commerce is concurrent.

Fourth: That in the exercise of power to regulate commerce by the states, the legislation must be local, limited, remote or incidental in its nature and peculiar to the conditions obtaining in the state.

Fifth: The state may not impose a direct burden upon interstate commerce or interfere directly with its freedom.

Sixth: That the power of the state to regulate commerce is contingent upon the congress having failed to make regulation in that respect provided for in the statute. When congress does act in that behalf the state enactment is superseded by the congressional enactment.

Now, it must be conceded that congress has passed no act attempting to regulate interstate commerce as to the sale of blue sky securities, or any supervision or inspection over the stocks and securities of corporations doing an interstate business. So that, if the doctrine of the Supreme Court heretofore quoted has any application at all, it would seem to be that the states clearly had this power until congress acted with a view of regulating it by uniform legislation.

We come now to another test which runs through these various decisions and is probably best expressed by Chief Justice Waite in **Hall v. DeCuir,** supra:

> "But we think it may safely be said that state legislation **which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress."**

Does the blue sky law of Ohio "seek to impose a direct burden upon interstate commerce, or to interfere directly with its freedom?"

The original blue sky law was passed in 1913 shortly after the people of Ohio by a majority of 88,000 adopted the following amendment to their constitution:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and **there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and**

issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. * * * "

Surely there is nothing in this constitutional amendment **seeking** or attempting to in any wise "directly" burden interstate commerce or even to regulate the same.

Pursuant to this constitutional amendment the legislature of Ohio in 1913 passed the first blue sky act, the title to which is as follows:

> "To regulate the sale of bonds, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales."

Surely there is nothing in this title that indicates any purpose to directly burden interstate commerce, and the subsequent amendments as found in 104 Ohio Laws 110 and 105-6 Ohio Laws 336-364 in nowise change this plain, primary and paramount purpose of the act.

SUMMARY.

We respectfully submit in the first place that the records show that neither of the plaintiffs below had any standing in a court of equity and that the court below erred in not dismissing their bills and in not sustaining the motion to dismiss of defendants.

We also respectfully submit as to the claim that the Ohio Blue Sky Law violates the interstate commerce clause of the federal constitution that we have demonstrated:

(a) That the opinions upon which the lower court based its decision were founded upon an erroneous

assumption that Nathan v. Louisiana and Paul v. Virginia had been overruled by this court.

(b) That certificates of corporate stock, bonds, etc., are not the subjects of interstate commerce.

(c) That the Ohio Blue Sky Law regulates only the sale within the state of Ohio by persons within the state of Ohio to persons within the state of Ohio.

1. Therefore the Ohio Blue Sky Law is not a regulation of interstate commerce.

As to the claim that the Ohio Blue Sky Law is violative of Section 1 of the Fourteenth Amendment we have demonstrated:

(a) That the enactment of such a law by the legislature of the state is clearly within the police power.

(b) That said law affords due process and equal protection and makes no unlawful discrimination, and

2. Therefore that the Ohio Blue Sky Law does not violate Section 1 of the Fourteenth Amendment or any other provision of the federal constitution.

Respectfully submitted,

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Attorney General of Ohio,
Solicitor for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

No. 438

HALL,

Appellant,

vs.

THE GEIGER-JONES COMPANY.

No. 439

HALL,

Appellant,

vs.

COULTRAP.

No. 440

HARRY T. HALL *et al.*,

Appellants,

vs.

ROSE *et al.*,

No. 413.

MERRICK *et al.*,

Appellants,

vs.

HALSEY *et al.*,

Appellees.

FEDERAL COURT OPINIONS.

Alabama, etc., Co. *v.* Doyle, 210 Fed., 173.
Compton Co. *v.* Allen, 216 Fed., 538.
Bracey *v.* Darst, 218 Fed., 483.
Halsey *v.* Merrick, 228 Fed., 806.
Geiger-Jones Co. *v.* Hall, 230 Fed., 235.

GEORGE W. WICKERSHAM,
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Of Counsel,
In No. 413.

DISTRICT COURT, E. D. MICHIGAN, S. D.

ALABAMA & N. O. TRANSP. Co. *et al.* *v.* DOYLE *et al.*	January 28, 1914. No. 33.

In Equity. Consolidated action by the Alabama & New Orleans Transportation Company, the Continental & Commercial Trust & Savings Bank, N. W. Halsey & Co., H. L. Higginson and others, and A. B. Leach and others, against Edward H. Doyle and others, members of the Michigan Securities Commission, to restrain the execution of Pub. Acts Mich., 1913, No. 143, known as the "Blue Sky Law." On motion for a preliminary injunction. Granted.

Before Denison, Circuit Judge, and Sessions and Tuttle, District Judges, under Section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp., 1911, p. 236]), as amended March 4, 1913 (chapter 160, 37 Stat. 1013).

Per Curiam. We take judicial notice of the common understanding that this "Blue Sky Law" was intended, as is said by the Attorney General, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations." If just this intent had been carried into effect by the act as passed, these cases would not be here; but scrutiny of the law discloses additional and very different effects. It

is not confined to corporations, but covers partnerships issuing, and individuals dealing in, securities; it does not relate alone to stocks, but as well to bonds, mortgages, and promissory notes; it is not limited to investment companies, as that term would ordinarily be defined, but extends the definition so that it may include most of the private corporations and partnerships in the United States; it does not cover fraudulent securities merely, but reaches and prohibits the sale of securities that are honest, valid, and safe; it does not simply protect the unwary citizen against fraudulent misleading, but it prevents the experienced investor from deliberately assisting an enterprise which he thinks gives sufficient promise of gain to offset the risk of loss, or which, from motives of pride, sympathy, or charity, he is willing to aid, notwithstanding a probability that his investment will prove unprofitable. Of course, not all of these results always follow; but some of them always may, and sometimes will. Take concrete instances. A merchandizing partnership cannot borrow additional capital from its home bankers on long time notes (over nine months) unless the Commission approves. If a timber company is insolvent, no one can deal in its first mortgage or underlying bonds, though these bonds are perfectly good, are not in default and not likely to be, nor can the Commission permit such dealings if it would. A successful automobile or furniture company may not increase and sell its capital stock save by the Commission's approval, and, if such a company has not been successful and the Commission thinks it is not likely to be, the company must liquidate; it will not be permitted to get new capital. If a company is organized to make and sell a new invention,

and if the Commission thinks the enterprise will not succeed, the stock may not be sold, even to skilled bankers who have investigated thoroughly and still desire to buy. If, through local pride or in the effort to save an existing investment or for any indirect benefit to come, the citizens of a town wish to take stock or bonds in a local company, though knowing they are likely to lose their investment and being willing to take the chance, yet they may not; this law forbids.

With the economic wisdom of such a law, this court has nothing to do; all such considerations are for the Legislature. McLean *v.* Arkansas, 211 U. S., 539, 547; 29 Sup. Ct., 206, 53 L. Ed., 315; C., B. & Q. R. Co. *v.* McGuire, 219 U. S., 549, 569; 31 Sup. Ct., 259; 55 L. Ed., 328. The generally laudable and remedial purposes of the act are to be granted; but, in endeavoring to make it so all-embracing as they thought wise, its draftsmen, as, we are forced to conclude, disregarded fundamental limitations imposed by the Federal Constitution.

[**1**] We reach this result fully recognizing the rule* that a court must not make such a decision on any evenly balanced or doubtful considerations, but must be clearly satisfied of the law's invalidity; and we proceed to state the reasons which compel our conclusions.

It is necessary, first, to recite the substance of the law, which covers ten pages of the published statutes, and cannot be quoted at length. By its title it purports to—

> "define and provide for the regulation and supervision of foreign and domestic investment

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*This rule may not always govern motions for preliminary injunction; but we now assume its full application.

companies, their agents and other persons, corporations and associations, selling the stocks, bonds or other securities issued by such investment companies; to protect the purchasers of the stocks, bonds or other securities issued by such investment companies; and to prevent fraud in the sale thereof; to create a commission to administer the provisions of this law; and to provide penalties for the violation thereof."

It then defines an investment company, foreign or domestic, as including every corporation, copartnership, company, or association which shall, either by itself or through others, sell or negotiate for the sale, in Michigan, of any stocks, bonds or other securities issued by it. Excepted from this definition of investment companies are: Municipal corporations, banks, trust companies, building and loan associations, and corporations not for profit. Exempted from the "stock, bonds or other securities" affected by the act are: commercial paper running less than nine months; the securities of quasi public corporations, the issue of which is regulated by any public service commission; and real estate mortgages where the entire mortgage is sold with the notes secured thereby (ordinary trust mortgage bonds remaining within the act). The State Banking Commissioner, the State Treasurer, and the Attorney General are constituted a "Securities Commission." No investment company shall offer to sell any of its securities until more than 30 days after it has filed with the Commission full data regarding itself and its securities, and paid to the Commission one-tenth of 1 per cent. (with a maximum of $100) upon the face value of the securities for the sale of which permission is sought. The Commission shall examine the data filed with it, and may require such further informa-

tion as it desires. If the Commission finds that the investment company is not solvent, or that its organization or plan of business is not fair, or that its proposed contracts or other securities are fraudulent or of such a nature that their sale would, in all probability, work a fraud upon the purchaser, or finds that such securities are of such a nature and character as would, in all probability, result in loss to the purchaser, then the sale thereof is to be permanently prohibited. Every investment company (probably meaning any company which has ever, since the passage of the act, issued and sold its securities) must file with the Commission annual and special reports, must keep its books according to a prescribed system, shall be subject to inspection by the examiners of the Commission whenever the Commission desires, and must pay the cost of such examinations. A "dealer" is defined as any person, firm, copartnership, corporation, or association, not the issuer, who shall sell or offer for sale any of the securities issued by any foreign or domestic investment company within the act, or who shall profess or engage in the busness of such selling; but the definition does not include the owner of such securities who is not the issuer, but who, for his own account, sells them, but the owner so selling is excluded from the class of "dealers" only if "such sale is not made in the course of continued and successive transactions of a similar nature." Dealers must be registered with the Commission, pay a registration fee of $50, furnish all requested information, and file and maintain lists of their authorized agents (at $3 each). No dealer shall offer for sale any securities unless the issuing investment company has complied with the law, or unless the dealer himself furnishes the information which would have been required from

the investment company. In no case can any issue or sale be made of the stocks, bonds, contracts, or commercial paper covered by the act until 30 days have elapsed after the application and data are filed with the Commission, after which time, lacking objection by the Commission, the prohibition expires, and the sale is (tacitly) approved. Some violations of the act are made felonies punishable by not more than $5,000 fine and five years in the state prison; others are made misdemeanors punishable by not more than $1,000 fine and 90 days' imprisonment. The only power of review conferred on any court is that "the Supreme Court may review by certiorari any final order of the Commission."

This law is now attacked in five cases which, for the purposes of this motion, have been consolidated. The defendants have filed a motion to dismiss, in the nature of a demurrer, without other showing, and therefore this motion for a temporary injunction must be decided upon the properly pleaded allegations of the bills and the accompanying affidavits, from which the following additional and essential facts appear: The Alabama & New Orleans Transportation Company is a New York corporation, engaged in the transportation business upon the Gulf of Mexico and between the city of New Orleans, La., and the city of Tuscaloosa, Ala., with principal offices in the city of New York, and operating offices at New Orleans and Tuscaloosa. It owns steamboats, wharves, and docks. A part of its authorized capital stock, both common and preferred, has been issued, and a part of its authorized first and second mortgage bonds have also been issued and sold. Through its agents, it has offered its first and second mortgage bonds and preferred stock for sale and desires to make further

sales in Michigan. The purchaser of its first mortgage bonds, already issued, desires to sell them in Michigan. It is solvent, its property is ample to discharge all its obligations, its bonds and stocks are valuable and the security therefore is amply sufficient, its business is profitable, the representations, upon which the sale of its bonds have been made, are true, its bonds and stocks are of such a nature that the sale thereof will not work a fraud upon, nor, in all probability, cause a loss to, the purchaser, and the plan of the business is fair and promises a substantial profit from its operation. In the other cases, two of the plaintiffs are corporations and two are partnerships. All are non-residents of Michigan, are engaged as "investment bankers" in buying and selling, through traveling agents and otherwise, stocks, bonds, and other securities affected by the act, have been so engaged for a considerable time, have invested large sums of money in, and have acquired a valuable good will connected with, their business, and have not misrepresented to their customers the character or value of the securities which they sell.

The objections urged against the act are: (1) That it deprives plaintiffs of their property in violation of the fourteenth amendment; (2) that it deprives plaintiffs of the equal protection of the laws in violation of the same amendment; (3) that it directly burdens interstate commerce; (4) that it delegates to the Commission legislative power and judicial power in violation of the Michigan Constitution; (5) that the title of the act is not confined to one object and does not express that object, as required by the Michigan Constitution.

[**2**] Before considering these questions, it is well to remember that this act is neither a tax law nor

a mere license law. It does not purport to be the former; and, while it carries some of the nomenclature and some of the features of the latter, its dominant characteristics and effect are prohibitory. We may therefore disregard the principles and decisions which have sustained, as constitutional, various state tax laws and various state laws which merely licensed the carrying on of some business or occupation. With this elimination in mind, we proceed to the questions involved.

1. *Are plaintiffs deprived of their property or liberty without due process of law?*

[**3**] That this act does deprive plaintiffs of property, as well as of liberty, is clear. Their right to issue and sell, or to buy and sell, securities is "property" and "liberty" under the familiar definitions adopted by the Supreme Court of the United States as well as by the Supreme Court of Michigan.

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying to a successful conclusion the purposes above mentioned." Allgeyer *v.* Louisiana, 165 U. S., 578, 589; 17 Sup. Ct., 427; 41 L. Ed., 832; Lochner *v.* New York, 198 U. S., 45; 25 Sup. Ct., 539; 49 L. Ed., 937; 3 Ann. Cas., 1133; Adair *v.* U. S., 208 U. S., 161; 28 Sup. Ct., 277; 52 L. Ed., 436; 13 Ann. Cas., 764.
>
> "The Legislature of the state is not empow-

> ered by the Constitution to regulate contracts between its citizens who are engaged in legitimate commercial business, or to require any class of persons to pay a fee for the right to carry on business, or to give a bond to perform their contracts which other parties may choose to make with them." People *v.* Berrien Circuit Judge, 124 Mich., 664, 667; 83 N. W., 594, 595 (50 L. R. A., 493; 83 Am. St. Rep., 352).

Indeed, we do not understand the Attorney General to question that the statute does operate to deprive plaintiffs of their liberty and property. He relies, rather, upon the principles stated by the Circuit Court of Appeals of this Circuit, speaking by Judge Cochran, in this language:

> "In the first place, it is to be noted that a statute or ordinance depriving one of his liberty or property is not in violation of said amendment merely because of such deprivation. Either of three things is essential to bring the deprivation within the amendment. It must have no real or substantial relation to the public welfare, or the deprivation it provides for must be a deprivation without due process of law, or it must amount to a denial of the equal protection of the laws. If the statute or ordinance has a real and substantial relation to the public welfare, if it provides for a deprivation by due process of law, and if it affords an equal protection of the laws, it is valid, notwithstanding its enforcement will deprive a person subject thereto of his liberty or property." Grainger *v.* Douglass Park Club, 148 Fed., 513, 523; 78 C. C. A., 199, 209 (8 Ann. Cas., 997).

[**4**] The first vital question, then, must be whether the provisions of the statute have "real or substantial relation to the public welfare." This form of words is capable of a construction broader

than may ultimately be approved (Noble Bank *v.* Haskell, 219 U. S., 104, 111, 580; 31 Sup. Ct., 299; 55 L. Ed., 341), but we take it as intended to be definitive of the police power, and so the extent of that power is the real question. It would be profitless to undertake any review of the decisions on this subject, or to try to adopt or to formulate any comprehensive and accurate definition of this phrase. It is enough, now, to remember that the prohibition in question has to do with transactions predominantly private, and not with those which are affected by a public interest, which arise from public grant or which exist by public sufferance. This statute does not deal with common carriers, grain elevators, or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant peddlers, and the like. The issuing of commercial paper, stocks, or bonds by a private company to get money for its own business no one can suppose is a public or quasi public enterprise; the business of buying and selling stocks and bonds and other securities is no more "affected by a public interest" than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to justify its entire prohibition save under drastic restrictions. We cannot shut our eyes to the fact, which all men know, that, as compared with the total dealings in securities covered and contingently prohibited by this act, those which may fairly be suspected to be of a fraudulent character are a very trifling proportion; and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business

and professional occupations. Applying the principle announced by the Supreme Court of Michigan in the Commission Dealers' Case, it is not clear that any scheme of modified prohibition can be applied at all to this entire business. We do not need to go so far. It is to be presumed that this question was considered by the Legislature; it has (theoretically) been decided by the legislators; and we may not unnecessarily overrule that decision.

However, there are some features of the statute which are not even within the shadow of the police power. The first of these is the provision that no promissory note, bond, stock, contract, or other security shall be sold within the state unless the Commission thinks it is worth the price which is asked. The act does not put it quite so baldly, but the language can mean nothing else. If the Commission finds that the "sale will, in all probability, result in loss to the purchasers," the sale is prohibited. Unless the security is worth the price asked, the "sale will, in all probability, result in loss to the purchaser." This is the plain meaning of the words. In that event, the Commission has no power to permit the sale; and if, after such a finding, the property is sold to a careful purchaser, who is in no way misled, but buys just what he wants and pays what he thinks it is worth, the seller may be imprisoned for five years; and it would be quite immaterial that the Commission was wrong and that the security sold was in fact worth the price. The element of fraud is wholly eliminated from this part of the statute, and all the dependent police power to protect the citizen against fraud must concurrently disappear. No definition of the police power, which we have seen or which the industry of counsel has found, is broad

enough to cover such a prohibition, and we are aware of no consideration which even plausibly supports its validity.

Of like effect and subject to like infirmity is the provision forbidding the sale of securities, if the Commission thinks that the company's organization or proposed plan of business is not "fair." Broader and vaguer language could not be chosen. It subjects to the practically uncontrolled discretion of the Commission every issue or general sale of stocks, bonds, or securities hereafter to be made in Michigan. For this and the provision regarding probable loss, we heard upon the argument and we find in the briefs no claim of justification on grounds of public welfare; and we know of none. They deprive plaintiffs of property, and they do not carry the semblance of "due process of law."

It may be assumed that the officials who constitute the Commission are more experienced and wiser than two citizens who desire to buy and sell property, with which they are familiar, at the price they have agreed upon; it may be assumed that these officials can foresee the coming events which will bring loss or profit on a proposed investment; but it has never yet been supposed by any court or any text-writer that it was within the police power of a state to decide for its citizens the financial advisibility of their investments, so long as the investors were not misled or deceived.*

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*We were told, upon the argument, that the Commission was not enforcing the law as it is written, but only so far as the Commission thought wise. It was said that all so-called standard securities might be sold without requiring full data and without waiting 30 days, and it was intimated that the provisions regarding "fairness" and "probability of loss" were only to be resorted to when the Commission thought the securities were fraudulent but did not wish to put its finding on that ground. In so far as these statements or intimations may be true, they only emphasize the inherently unlawful character of the Act and the temptation and opportunity for a rule of individual discretion and not of law.

[5] Still another limitation which we think wholly beyond the authority of the police power is this: During the period of 30 days after the application is made and data filed with the Commission, there can be no sale of the securities. The Commission is powerless to permit; any company which issues and sells or any dealer who sells is guilty of felony. This is the law, without regard to the character of the securities. They may be of the highest quality in every respect; the emergency requiring immediate sale may be extreme; these considerations cut no figure; the law proclaims a 30-day paralysis. If a company, perfectly solvent but in need immediately of ready money, arranges a bond issue and has people ready to purchase the bonds, nothing can be done for 30 days; in the meantime things must stop and the company, perhaps, must lose its credit and fail. Such a provision is an arbitrary and oppressive interference with the right of contract; it bears no "reasonable relation" to the public health or the public morals, or even to the "public welfare," in the broadest conceivable sense of that phrase.

The decisions on the Bulk Sales Laws (Lemieux *v.* Young, 211 U. S., 489; 29 Sup. Ct., 174; 53 L. Ed., 295; Kidd *v.* Musselman, 217 U. S., 461; 30 Sup. Ct., 606; 54 L. Ed., 839) are neither controlling nor closely analogous. For a retail dealer, who is seriously indebted, to sell his stock in bulk suddenly and without the general knowledge of his creditors is an unusual and abnormal thing. It is almost, perhaps quite, a badge of fraud in itself; and to provide that such sales shall be delayed a very brief time, perhaps five days, in order that notice may be given to individuals directly interested distinctly tends to protect the business com-

munity from fraud. Such a theory of the police power furnishes no support for thinking that the regular and normal course of dealings in one great branch of business may be suspended for 30 days.

2. *Does the act deprive plaintiffs of the equal protection of the laws?*

This is the second question stated by Judge Cochran; and the answer depends on whether the classifications adopted by the statute are justified by the rules of classification which have been considered in many cases by the Supreme Court of the United States. Plaintiffs, under this head, urge many detailed objections. They say that such distinctions as are attempted cannot lawfully be made between partnerships and individuals, between long-time and short-time paper, between ordinary mortgages and trust mortgages securing a bond issue, between the owner and the dealer, between stock subscriptions and stock sales, and in other particulars which we need not specify. We have not recited the statute fully enough to make all of these objections intelligible, because we do not decide them. Some are hypercritical; some are at least serious. For example, it is difficult to see why one rule should be applied to an individual who gives a trust mortgage upon his property securing a series of his notes and bonds, and a different rule to a partnership which does the same thing. However, we pass these objections by, as other grounds are clearer.

[**6**] Another reason urged why plaintiffs are deprived of equal protection of the laws is that the statutory penalties are so excessive that persons interested dare not make a test case in the ordinary way. Such terrorizing penalties furnish a reason

why a court of equity may have jurisdiction to enjoin the enforcement of the law, temporarily, till its validity can be determined (Ex parte Young, 209 U. S., 123; 28 Sup. Ct., 441; 52 L. Ed., 714; 13 L. R. A. [N. S.], 232; 14 Ann. Cas., 764); but where the penalties are separable, as they are here, their possible invalidity may be a defense against their direct enforcement, but does not furnish ground for pronouncing the whole law invalid (Willcox *v.* Consolidated Gas Co., 212 U. S., 19, 53; 29 Sup. Ct., 192; 53 L. Ed., 382; 15 Ann. Cas., 1034; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, 395; 14 Sup. Ct., 1047; 38 L. Ed., 1014; L. & N. R. Co. *v.* Garrett, 231 U. S., 298; 34 Sup. Ct., 48; 58 L. Ed., —; Grand T. Ry. Co. *v.* Mich. Ry. Com., 231 U. S., 457; 34 Sup. Ct., 152; 58 L. Ed., —).

3. *Do the provisions of the act constitute a direct and substantial burden on interstate commerce?*

[**7**] It must be conceded that, if such burden is created, the act is, so far, void. We cannot doubt that stocks and bonds are now the subject of interstate commerce, and that shipments and sales of them, between the states, are interstate commerce. We do not find that this has been expressly held in any authoritative decision, but, in the present development of commerce, it would be regarded as obvious, save for the argument based upon Nathan *v.* Louisiana, 8 How., 73; 12 L. Ed., 992 (involving foreign bills of exchange) and Paul *v.* Virginia, 8 Wall., 168; 19 L. Ed., 357 (involving insurance contracts).* The former case really involved only

*See the latest application and review of these and their dependent cases in N. Y. Life Ins. Co. v. Deer Lodge County, 231 U. S., 495; 34 Sup. Ct., 167; 58 L. Ed., —, Dec. 15, 1913.

the question whether a state tax or license fee could be imposed upon a citizen dealing in foreign bills of exchange. Such a tax, under the rules now familiar, and even if made an incident attendant on interstate commerce, would often be only an indirect burden upon such commerce, and so would be valid. The special insurance contract involved in the latter case is essentially different from stocks, bonds, and commercial paper. However, if either of these cases might otherwise be thought now controlling, we think the opinion in the Lottery Cases (188 U. S., 321; 23 Sup. Ct., 321; 47 L. Ed., 492) requires the contrary result. As to stocks, some distinctions from Lottery Cases can be drawn, because the certificates, in part, represent rights of membership; but we cannot appreciate the force of any considerations whereby it might follow that, although lottery tickets are the subject of interstate commerce, bonds and commercial paper are not. They pass freely from hand to hand, title to many of them passing by delivery; they are subject to state taxation; they are protected by state statutes against larceny; in an increasing volume from year to year, they have come to take a most important place in the business and commerce of the country. They satisfy, in every respect, the essentials of the definition in the Lottery Cases; indeed, they satisfy the more limited definition contended for in the minority opinion in that case.

If bonds and commercial paper and (probably) stocks are the subject of interstate commerce, are interstate dealings in them directly burdened by this law? Dealings wholly by mail, in which the nonresident vendor only sends letters into the state, and, upon the end of the negotiations, sends the securities into the state to be there paid for, might

escape the statute, not because its general language does not cover them, but because its operation might be limited to avoid the clear invalidity which would otherwise result. However, we know that the great mass of business of this kind is done by traveling agents or solicitors for foreign investment bankers, brokers, and issuing corporations. These solicitors and salesmen travel through the state and negotiate and close sales. They may carry with them the stock certificates or bonds, or they may, on closing a sale, telegraph or write to the home office and have the securities sent over, either directly to the purchaser or to themselves, for delivery by them. If the home office is at (*e. g.*) Chicago, the delay is for only a few hours. The distinctions between these two methods (personal carrying by salesmen and sending home) are shadowy in principle and often negligible in practice. We think the statute is clearly intended to be applied to this kind of business, by either method. The law says, in Section 18:

> "It shall be unlawful for any corporation, copartnership, association, company, firm, person or agent to sell or offer for sale, or attempt to sell at any place within this state or to any person within this state, stocks, bonds, or other securities, * * * unless, etc. * * * No investment company or dealer shall sell or offer for sale at any place or to any person within this state any stocks, bonds, or other securities issued to any investment company, unless," etc.

Indeed, upon the argument, the Attorney General frankly admitted that the statute must be interpreted to cover these methods of business by non-residents, and it is this very feature for the protection of which at least four of the consolidated bills are filed.

This brings us to the inquiry whether the burden is direct and so forbidden, or indirect and so permitted. It is established by many familiar cases, some of the more recent of which are cited in the margin,* that, although certain exercises of the police power (of which ordinary licensing laws and food inspection laws are the most familiar examples) do burden interstate traffic in legitimate articles of commerce, yet, because the law is within the police power, the burden is considered not sufficiently substantial and direct to make the law invalid. Whether there may be a field for exercise of police power, which exercise is legitimate from all other points of view and yet forbidden as against interstate commere under the rule which has its latest development in Crenshaw *v.* Arkansas, 227 U. S., 389, 399; 33 Sup. Ct., 294; 57 L. Ed., 565; Rogers *v.* Arkansas, 227 U. S., 401, 409; 33 Sup. Ct., 298; 57 L. Ed., 569, and Adams Express Co. *v.* City of N. Y., — U. S., —; 34 Sup. Ct., —; 58 L. Ed., —, we need not consider. We may assume, for the purposes of this opinion, that this inquiry, whether the burden is "direct," is only another form of the question whether the act is within the police power.

Is this a mere licensing law? So far as it affects the investment company, we see no similitude. Engaging in a business is not regulated or permitted; it is the proposed individual transaction which is the subject of scrutiny. The investment company receives no license in substance or in form. If it fully complies with the law, and the issue and

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*C., B. & Q. R. R. v. McGuire, 219 U. S., 549, 568; 31 Sup. Ct., 259; 55 L. Ed., 328; Chicago, etc., Co. v. Fraley, 228 U. S., 680; 33 Sup. Ct., 715; 57 L. Ed., 1022; Barrett v. Indiana, 229 U. S., 26; 33 Sup. Ct., 692; 57 L. Ed., 1050; U. S. Fidelity & Guaranty Co. v. Kentucky, 231 U. S., 394; 34 Sup. Ct., 122; 58 L. Ed., —.

sale of stocks and bonds are approved, and if the next year or the next month it wishes to make another issue which may be substantially similar, it is forbidden to do so until there is another submission and another tacit approval. To call such provisions the licensing of an occupation or business is a misnomer.

As to dealers, there is more of the form of license. They are required to register and to pay a registration fee and are subject to some general provisions and regulations. For this reason we said above that some parts of the act used the nomenclature of a license law. However, if this is a license to the dealers, it avails them nothing. They cannot do one item of business, until that item has passed scrutiny; hence it is clear that the dominant purpose is not to license and supervise individuals in the following of an occupation or business, but to regulate, to the point of prohibition, the business itself.

Is the act, although affecting interstate commerce, sustainable as an inspection statute, upon the same principle on which food inspection laws have been held valid? This question may be answered by considering the case of Savage *v.* Jones, 225 U. S., 501, 525; 32 Sup. Ct., 715; 56 L. Ed., 1182, in which many of the decisions are collated. The Indiana act required certain food products offered for sale to display a statement of their ingredients. This was thought to be a provision wholly appropriate to the protection of the purchasing public, and not to go beyond the reasonable occasion for such protection, and was said to be "appropriate means for accomplishing the legitimate purpose of the act." To the argument that the statute permitted the officials to set up arbi-

trary standards, the court replied, "That it does not appear that any arbitrary standard has been set up." In the present case, the statute itself sets up the arbitrary standard, viz., the Commission's opinion as to the probability of loss. If the Indiana statute had provided that the food product should not be sold in the state, if the state chemist concluded that in all probability it was not of much nutritive value, the case would be parallel. An examination of numerous other cases cited indicates that in each one, where a regulation somewhat affecting interstate commerce has been sustained, it has been found that the regulation and prohibition involved had immediate and direct relation to the legitimate object of the statute, and so were within the police power.

We rest our conclusion here on the proposition that this statute, in the respects which we have pointed out, finds no support in the police power, and accordingly that its restraint of interstate commerce is not merely indirect or incidental.

Another reason, if it were necessary, for holding that the restraint upon this interstate commerce is direct is found in the fact, already discussed, that for 30 days there is an absolute prohibition of any dealings on any terms. When we observe that a nonresident, owning stocks or bonds of the highest quality and upon which no criticism has been or can be made, and who desires to sell them in Michigan to some one who there desires to buy, is totally forbidden to do so for a period of 30 days on penalty of being guilty of a felony, and that there is no machinery of the law by which he can get permission or approval until the thirty-first day, it is clear enough that the restraint is substantial and direct.

4. *Does the act delegate legislative or judicial power?*

[8] So far as this objection is directed against the creation of an administrative board supervising business affected with a public interest, it is, of course, untenable. So far as it is directed to the power of the Commission to determine the value of the securities and their fraudulent character, it is, in part, covered by what we have said. Whether the right to determine finally what is and what is not fraudulent, and under a statute which creates no standards, can be vested nowhere save in a court, we will not now consider. So, with the questions whether the failure to provide for notice and hearing is a fatal defect, and whether it is necessary, considering all the provisions of the act, that there should be some judicial review beyond a mere writ of certiorari, under which the Commission's improvident finding of fact would be unassailable.

5. *Is the title of the act sufficient?*

It is doubtful whether one reading the title of the act would suppose that it prohibited the sale of securities which were not fraudulent but merely not worth the selling price; but the broad language of the title is capable of a construction which will cover all the provisions of the act, and, in advance of any decision by the Supreme Court of the state, we should hesitate to make a conclusion of general invalidity depend upon this ground.

[9] 6. There remains only one question. We have found that the power given to the Commissioners to forbid the sale of securities at less than what they think is the proper price is a taking of

property and is not within the police power, and that the act directly and substantially burdens interstate commerce. Can it be said that these features can be eliminated and still that the law generally may stand? This question is put in concrete form by Section 24 of the act, which is:

> "Sec. 24. Should the courts of this state declare any section or provision of this act unconstitutional or unauthorized, or in conflict with any other section or provision of this act, then such decision shall affect only the section or provision so declared to be unconstitutional or unauthorized and shall not affect any other section or part of this act."

While this provision in terms refers only to the state courts, such limitation may well be overlooked, for we think the whole section is only declaratory of the existing and well-settled judicial rule. It has long been established that the presence, in an act, of an unconstitutional section or provision would not make the whole act invalid if that part could be cut out and leave a workable act which it might be presumed the Legislature would have passed. We cannot see that Section 24 has any force beyond this, except, perhaps, to accentuate the existing presumption that the Legislature would have adopted the remaining, primarily valid, portion of this act. It cannot be that, if the unconstitutional portions are so interwoven with the whole purpose and operation of the statute that they are not fairly separable, the act may nevertheless be enforced in a form in which it was not passed and in which it might not be recognized by its framers. The provisions that the Commission shall pass on the probability of loss (as distinct from fraud) and on the "fairness" of the plan form an integral part of each section cre-

ating the Commission's powers. They are bound to modify and characterize the Commission's whole action. It is not improbable that these provisions were inserted in the belief that without them the statute would be practically unworkable. They form an inherent part of the unitary statutory scheme to save citizens from probable financial loss. Certainly the difference between a fraudulent enterprise and an unprofitable one is vital. The criterion of "probable loss" is broader and more inclusive than the criterion of "fraud"; it is not consistent to destroy the inclusive and preserve the included. We cannot, even with the aid of Section 24, presume that the law would have been passed if it had prohibited only fraudulent transactions.

So, too, the direct restraint on interstate commerce is an inherent part of many different sections. To enforce the law against the citizens of Michigan and not enforce it against nonresidents would doubtless be a result most surprising to the Legislature. It is an essential part of the scheme of the law that all persons, residents, and nonresidents shall be prohibited from selling, in Michigan, securities which would probably result in loss to the purchaser; and the excision of this feature leaves the law without vitality.

Further, after the 30-day provision is eliminated, nothing operative remains.

Another branch of what we have called the only remaining question is this: May all the statutory restrictions be enforced against corporations, foreign or domestic, upon the principle that the state may attach any conditions to what it creates or voluntarily permits?* This act does not purport

*This is a moot question, as to two of the consolidated cases.

to regulate corporations. There are no separate sections relating to corporations, which can be preserved and enforced. Particularly as relates to dealers, every restriction is carefully applied to corporations and partnerships and individuals. If only corporate dealers were affected, the statute would be evaded so easily as to make it worthless. It is clear to us that, if we undertook to preserve this act to affect corporations only, we would be making a law in violation of the legislative intent.

Furthermore, as regards foreign corporate dealers, like two of the present plaintiffs, whose business constitutes partly, if not mainly, interstate commerce, the act, to be sustained, must be separable with reference to their interstate and intrastate transactions; and this is upon the well-established principle that states have no power to prohibit or to fetter by conditions the right of corporations to carry on interstate trade in legitimate articles of commerce. International Text-Book Co. *v.* Pigg, 217 U. S., 91; 30 Sup. Ct., 481; 54 L. Ed., 678; 27 L. R. A. (N. S.) 493; 18 Ann. Cas., 1103.

We are aware that in the Berea College Case, 211 U. S., 45; 29 Sup. Ct., 33; 53 L. Ed., 81, the Supreme Court enforced against a corporation a statute which was drawn to apply to corporations and individuals, and did so without deciding whether individuals must submit; but this may well have been upon the theory that the particular statute justified a presumption that it would have been passed as to corporations alone. It did not appear that there was any person within the state to be affected by the law at the time it passed, except the corporation which complained. There can be no such presumption where it was known that the law would affect partnerships and individuals in

great number, and where equality of treatment between corporations and individuals was clearly intended. Further, in the Berea College Case, the state court had decided that the statute was to be construed as if it had been amendatory of the college charter, and that construction of the statute was controlling.

The preliminary injunction must be granted. The District Judge for the Eastern District of Michigan will settle the terms of the order and will allow an appeal, if one is desired. The court, as now constituted, has no jurisdiction beyond the motion for injunction.

(Reported in 210 Fed. Rep., 173 *et seq.*)

IN THE

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF IOWA, CENTRAL DIVISION.

Before—SMITH, Circuit Judge, MCPHERSON and POLLOCK, District Judges.

WILLIAM R. COMPTON COMPANY, BREED, ELLIOTT & HARRISON, and MCCOY & COMPANY, Complainants, *v.* W. S. ALLEN, GEORGE COSSON, Defendants. JOHN NICKERSON, JR., and A. B. LEACH & COMPANY, Interveners.	No. 12A Equity.

Memorandum of Decision on Application For Temporary Injunction.

Filed July 6th, 1914.

Per Curiam:

This suit is brought by plaintiffs, corporate citizens, respectively, of the States of Missouri, Indiana and Maine, against defendants, respectively, the Secretary of State and the Attorney General of the State of Iowa, to restrain the enforcement of an act of the General Assembly of that state, approved April 19, 1913, commonly termed "The Blue Sky Law" of that state, which provides as follows:

In this suit, by leave of court, John Nickerson, Jr., a natural citizen of the State of Missouri, and A. B. Leach & Co., a co-partnership with its principal place of business in the City of New York, composed of Arthur B. Leach and James B. Campbell, citizens of the State of New York, and Ferry W. Leach and George C. Olmstead, citizens of the State of Illinois, have intervened, praying the same relief. A restraining order was granted by the presiding judge of the court, and this suit being one in which the injunctive relief sought is the life of the case and against the legislative action of a State, the application for an interlocutory injunction *pendente lite* was submitted to and stands for decision in accordance with the provisions of Section 266 of the Judicial Code.

The grounds of attack made against the constitutional validity of the act may be briefly summarized, as is done by complainants, as follows: (a) The act offends against the fourteenth amendment by depriving persons of property without due process, and denies the equal protection of the laws and abridges the privileges and immunities of citizens of the United States; (b) that it offends against the commerce clause of the Federal Constitution; (c) that it grants privileges and immunities to citizens of Iowa denied to citizens of other states; (d) that it is a delegation of legislative and judicial power; (e) that the act was not regularly passed.

While courts of justice may not concern themselves with the wisdom or policy of a law the validity of which is challenged on constitutional grounds, such consideration being alone addressed to the law-making power, yet it may safely be observed in this case, the purpose of the act under

consideration as declared by the Attorney General of the State, namely, to protect the humble, honest citizens of the State, unlearned in the intricacy of business affairs as conducted at this day, from being plundered and despoiled of their small earnings and property, acquired through years of patient toil, by the alluring machinations and the deceptive, misleading and fraudulent devices which the unscrupulous, cunning and deceitful "get-rich-quick-Wallingfords" of our day practice, is a most laudable obligation and important duty of the State. And if this State, in its attempted compliance with such just obligation to its citizenship, be not found, by a careful study and analysis of the act in question and a reasonable and rational comparison of its provisions when ascertained and understood with the organic law of the nation or State, to have clearly and certainly violated some fundamental principle thereof established by the people for their mutual protection from invasion by the law making power, it is the clearly defined and well recognized duty of this court to uphold the act and allow the people, in the manner authorized, by the organic laws of the State, to modify or repeal it, if on fair trial it be found vicious or harmful in actual operation.

Viewed in this light, and as the case as now presented arises only on an application for a temporary order restraining the enforcement of the act until final decree on full hearing, many grounds of invalidity are presented which need not be fully considered or ruled. Concerning the power of the State to regulate or control by its laws the operations and dealings of investment companies, as that term is usually employed and understood, whether such companies are created under the laws of this

State, or, are created under the laws of foreign states, and make application for the privilege of engaging in business within this State, little of doubt arises and nothing need be said.

Again, as to the manner of the passage of the act of which complaint is made, whether the enrolled bill shall be held as final and conclusive evidence of its contents, will not be considered or ruled on this hearing. Such subject-matter is so entirely a matter of State policy and concern in the enactment of its law, an orderly course of judicial procedure in the administration of justice dictates the wisdom, where possible, as in this case, of leaving that question to the determination of the highest judicial tribunal of the State, which is in the end the final arbiter, untrammelled and untouched by any opinion of this court, for, as we are advised, this identical question is pending therein for decision.

Coming now to a consideration of the act for the purpose of determining whether it does in express terms and undoubted meaning and intent contravene any provision of the organic law of the nation or this State, it is seen to undoubtedly prohibit any person or citizen, natural or corporate, of any foreign state, from selling or offering for sale, in person, or through another, in any manner or way whatever, any stocks, bonds or other securities or obligations, of every kind and nature, to any person within this State, unless the provisions of the act are first complied with, under heavy penalties. That is to say, by its express terms the act prohibits a citizen of a sister State of this country, owning and having stocks, bonds, certificates or securities, although the same are listed on the exchanges of the

country and have a well established actual and salable value, from either bringing or sending the same into this State for sale unless he first meets the exactions of this law, or by so doing subjects himself to its penalties. Nor, may he enter upon and conduct negotiations looking to or consummating a sale of his property by correspondence through the mails of the country, either personally or through his agent, without compliance with the provisions of the act or abiding its penalties.

Can it be a State of this Union, under our Constitution, possesses the power to punish the doing of such customary, everyday transactions unless the conditions, exactions, regulations and restrictions imposed by this law be first met and performed?

That the act in express terms and by inclusive definitions employed therein does so ordain cannot be gainsaid or denied. That such is the effect and purpose of the act in controversy was not disputed by the able Attorney General of the State on the argument of this cause. That the transportation of such articles of personal property from one State to another for the purpose of barter, sale and delivery, constitutes not only commerce among the states of this country, but a very large and important element of such commerce in the magnitude of business transacted and the amounts of money involved, is self-evident. The District Court for the Eastern District of Michigan, ruling this identical question in Alabama & N. O. Transp. Co. *v.* Doyle, 210 Fed., 173, said:

> "We cannot doubt that stocks and bonds are now the subject of interstate commerce, and that shipments and sales of them, between the

> states, are interstate commerce. We do not find that this has been expressly held in any authoritative decision, but, in the present development of commerce, it would be regarded as obvious, save for the argument based upon Nathan *v.* Louisana, 8 How., 73, 12 L. Ed., 992 (involving foreign bills of exchange), and Paul *v.* Virginia, 8 Wall., 168, 19 L. Ed., 357 involving insurance contracts)."

In the Lottery cases, 188 U. S., 321, it was held by a divided court even lottery tickets which have no absolute value whatever, either in form or fact, but have merely a contingent speculative and gambling value, were held to be the subject of interstate commerce when transported from one State into another. While the soundness of this view was assailed by a vigorous dissent on the part of almost one-half of the court, yet, as shown by the review of authorities made in the dissenting opinion, no reason is left for doubt but that negotiable securities, corporate shares, promissory notes, corporate and municipal bonds, absolute in form, are the subject of interstate commerce, and would have been so declared by the members of the court joining in the dissent. In the opinion in that case, Mr. Justice Harlan said:

> "What is the import of the word 'commerce' as used in the Constitution. It is not defined by that instrument. Undoubtedly the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic and which have in themselves a recognized value in money constitutes interstate commerce."

Under the many decisions from the Supreme Court since that of Nathan *v.* Louisana, *supra*,

holding foreign bills of exchange, and Paul *v.* Virginia, *supra,* holding insurance policies, not subjects of interstate commerce, we have no doubt but that court, when presented with the question, will declare such security and property rights, negotiable and otherwise, as are sought to be regulated by the act in question, are proper subjects in interstate commerce.

That the act in question in prescribing the only terms and conditions on which complainants and interveners, citizens of foreign states, may transact the business of disposing of their property within the borders of this State does impose a burden of interstate commerce needs no further comment than a reading of the act itself, for, by the law, it is placed within the power of officers of the State to absolutely prohibit such business transactions. And, it would further seem, from the briefs and arguments for defendants in the case, in thus far there is no substantial disagreement with the view taken, for the insistence made by defendants is not that the act in question does not impose a burden on those dealing in securities in this State, but rather, that the burden so imposed is of such nature the State may lawfully prescribe it under its reserve powers, even on interstate commerce. That is to say, under its police power, to enact inspection or license laws for the purpose of preventing the imposition of fraudulent practices on its citizens. A reading of the act in question will disclose its requirements, exactions, prohibitions and penalties are leveled against all persons, corporations and aggregations of individuals, by whatever name or nature known (except a few favored citizens of the State) who, by definitions made a part of the act itself, are

gathered into two general classes under the name of "investment companies" and "stock brokers," and the power to regulate the business of all by definition so classified in their business dealings in stocks, bonds, certificates, securities, etc., within the State, extends even to absolute prohibition thereof, unless compliance with the requirements of the act be made to the satisfaction of officials of the State charged with the enforcement of the law. With the power of the State to so classify by definitions all individuals, whether natural or artificial, and all aggregations of individuals by whatever name known, we are not concerned at this time. The question here presented is, does the power of the State extend to the regulation, control and prohibition of interstate commerce in such subjects as are involved in this act under its reserved right to inspect for the public good?

While the act is neither in form or title styled an inspection act, the title thereto being merely, "An Act to provide for the regulation and supervision of investment companies and providing penalties for the violation thereof," such fact is thought to be of no greater moment, for the power to enact the law must be determined from that which is sought thereby to be ordained or accomplished, and not from the title it bears. Henderson *et al.* *v.* Mayor of New York *et al.*, 92 U. S., 258; Minnesota *v.* Barber, 136 U. S., 313; Standard Stock Food Co. *v.* Wright, 225 U. S., 540. While under authority of the foregoing cases, and many others, such as Plumely *v.* Mass., 155 U. S., 462; Crossman *v.* Lurman, 192 U. S., 189; McLean *v.* Denver & Rio Grande R. R. Co., 203 U. S., 38; Dalamater *v.* South Dakota, 205 U. S., 93; Savage *v.* Jones, 225 U. S., 501, the power of the State to provide for

the inspection of legitimate subjects of interstate commerce moving as such, to charge a reasonable fee therefor, and to even prohibit the importation of such articles, commodities and products as do not conform to the test applied is undoubted, yet it must be held the scope of such inspection laws is not without its limitation as applied to the nature of the person, article or thing designed by the law to be inspected and the manner and method of the inspection to be employed. In People *v.* Compagnie Gen. Transatlantique, 107 U. S., 59, the State of New York attempted by legislation to provide for the inspection of immigrants coming from foreign countries into the ports of that State. There was no doubt but that such inspection was reasonably necessary and was promotive of great public good in preventing the spread of both physical ailments and moral diseases. The question presented was, the power of the State to provide such inspection by its law. Mr. Justice Miller, delivering the opinion of the court said:

> "In addition to what is said above, it is apparent that the object of these New York enactments goes far beyond any correct view of the purposes of inspection law. The commissioners are 'to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals or pauper lunatics, idiots, or imbeciles * * * or orphan persons, without means or capacity to support themselves and subject to become a public charge.
>
> "It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection.
>
> "What is inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or ap-

plying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever."

Conceding, therefore, to the fullest extent, the reserve power of the State to provide for the inspection of all such articles and commodities as food stuffs for man or beast, drugs, medicines, products, compounds, and the life, moving in interstate commerce where inspection thereof is not already provided by national laws, and when, as stated by Mr. Justice Miller, some crucial test is established and may be applied, such as weighing, measuring, analyzing and the like, it is apparent no such standard or test is or can be established under the act in question, but the test to be applied thereunder must and does rest upon evidence taken, examined and weighed. It must be held the subjects of interstate commerce therein sought to be regluated and controlled are not only burdened by the act, but are directly burdened thereby, and that such articles are not the subject of State inspection laws. As bearing on this question, see Alabama & N. O. Transp. Co. *v.* Doyle, *supra;* International Text Book Co. *v.* Pigg, 217 U. S., 91; Crutcher *v.* Kentucky, 141 U. S., 47; Butler Bros. Shoe Co. *v.* United States Rubber Co., 156 Fed., 1.

Again, the citizenship of this country is dual in its nature. We owe allegiance to two sovereigns, our country and our State. In turn we are entitled to that measure of protection which each under its Constitution and laws may afford us. Our national Constitution prohibits any State from granting immunity from punishment and regulation by law to its citizens which it denies to citizens of other States. The mere reading of the act

in question makes entirely clear the contention of complainants and interveners that it does impose burdens upon and denies privileges to citizens of other States which are not imposed upon and which are granted to citizens of Iowa. That such favoritism of the law of a State to its citizen subjects as this act grants cannot be successfully defended, no matter how laudable the purpose sought to be accomplished thereby may be thought to be, would appear settled by numerous authoritative decisions. St. L. & San Francisco Railway *v.* Gill, 156 U. S., 649; Covington L. Turnpike Road Co. *v.* Sandford, 164 U. S., 578; Cotting *v.* Kansas City Stock Yards Co. & C., 183 U. S., 79; Chicago, M. & St. P. Ry. Co. *v.* Westby, 178 Fed., 619; Butler Bros. Shoe Co. *v.* United States Rubber Co., *supra.*

The view taken, as heretofore expressed, renders any lengthy discussion of this important question, or any discussion whatever of other objections made by complainants and interveners to the validity of the act, on this application for a mere temporary order, unnecessary. Such matters can be thoroughly considered and ruled on final decree. Meanwhile, the temporary order applied for must be granted, on such terms as to form and bond required to be given, and on such orders as to an appeal, if one shall be prayed, as the presiding judge of this court may be advised are proper.

It is so ordered.

July 6, 1914.

WALTER I. SMITH,
Circuit Judge.
SMITH McPHERSON,
District Judge.
JOHN C. POLLOCK,
District Judge.

(Reported in 216 Fed. Rep., 538-549.)

Bracey et al. v. Darst, State Auditor of West Virginia et al.

District Court, N. D., West Virginia. December 5, 1914.

In Equity. Suit by Smith H. Bracey, Howie Mining Company, W. R. Covert, C. E. Wyatt, Augustus Tyler and Charles La Due against John S. Darst, Auditor of the State of West Virginia, A. A. Lilly, Attorney General of the State of West Virginia, and R. L. Addleman, Prosecuting Attorney for the County of Ohio, West Virginia. On motion for preliminary injunction. Motion granted.

Before Pritchard and Woods, Circuit Judges, and Dayton, District Judge.

Dayton, District Judge. 1. This hearing is had under the provisions of section 266 of the Judicial Code of the United States (Comp. St. 1913, Sec. 1243), upon application of the plaintiffs for a temporary injunction to restrain the state officers, named as defendants, from prosecuting criminal proceedings against the individual plaintiffs for alleged violations of an act of the Legislature approved February 11, 1913, commonly known as the "Blue Sky Law."

The act is charged to be unconstitutional, invalid, and void: (1) Because it deprives them of their rights to sell in the state of West Virginia valuable stocks, bonds, and securities, which is depriving them of their property without due process of law; (2) that it denies the plaintiffs and each of them of the equal protection of the laws as guaranteed to them under the fourteenth amendment to the Federal Constitution; (3) that it imposes a burden and practically amounts to prohibition of interstate commerce, contrary to section 8 of article 1 of the Constitution of the United States; (4) be-

cause it attempts to vest in and delegates to the Auditor of the State legislative, executive, and judicial powers in violation of the Constitution of West Virginia, and especially section 1, art. 5, thereof.

The terms of the act so assailed are:

* * * * * * *

The Legislatures of at least six other states have enacted so-called "Blue Sky Laws." These states are Arkansas, Kansas, Iowa, Michigan, Oregon, and Florida. So far as we can learn, the Arkansas act has not been passed upon by either the court of last resort of the state or by the United States courts of the state, but a similar statute of the state of Iowa has been passed upon by one Circuit Judge and two District Judges of the Eighth circuit, which includes the state of Arkansas. The same statement is true of the Kansas act; Kansas being in the Eighth circuit. The Iowa act has been declared unconstitutional by the District Court of the United States for the Southern District of the state; Circuit Judge Smith and the two District Judges of the state, McPherson and Pollock, sitting and all three concurring. William R. Compton Co. *v.* Allen (D. C.), 216 Fed., 537.

The Michigan ac has been declared unconstitutional by the United States District Court for the Eastern District of that state; Circuit Judge Denison, of the Sixth Circuit, and the two District Judges of the state, Sessions and Tuttle, sitting and all concurring. Alabama & N. O. Transp. Co. *v.* Doyle (D. C.), 210 Fed., 173.

The constitutionality of the Oregon act, in a case styled National Mercantile Co. *v.* R. A. Watson *et al.*, 215 Fed., 929, was submitted to the United States District Court of Oregon, Gilbert, Circuit Judge, and Wolverton and Bean, District Judges,

sitting, but was not passed upon, the court dismissing the proceeding upon a plea in abatement, denying plaintiff's right to sue, it not having conformed to the provisions of the Oregon law permitting corporations to do business in that state.

The Supreme Court of Florida, in *ex parte* C. H. Taylor, 66 South., 292, at its June term, 1914 (not yet officially published), has sustained the so-called "Blue Sky Law" of that state. An analysis of that law shows that it provides by section 1 that every corporation (municipal and others specifically named, excepted) which shall offer for sale within the state of Florida, and outside of the county where it has its principal office or place of business, "through any agency whatsoever," any of its stocks, bonds, debentures, certificates, policies, or other securities of any kind or character, is defined to be a "domestic investment company." "Any corporation organized under the laws of any other state, territory or county shall be known for the purposes of the act as a 'foreign investment company.' "

Section 2 requires both domestic and foreign investment companies, before offering any stocks, bonds, etc., to file with the comptroller with a $5 filing fee (a) its proposed plan of business, (b) a copy of all contracts, etc., which it proposes to make with or sell to its contractors, (c) its name and location, (d) a financial statement of its affairs, (e) such other information of its affairs required by the comptroller, and (f) verified copies of its charter, constitution, by-laws and other papers pertaining to its organization.

Section 3. Foreign investment companies are also required to file written irrevocable consent that actions against them may be commenced in the proper court of any county in the state where either

cause of action arose or plaintiff resides, by service of process upon the Comptroller.

Section 4 makes it the duty of comptroller and Attorney General to examine the statements filed or to make or have made a detailed statement of the corporations' affairs, and, if it is ascertained that it is solvent, that its plan of business is just and equitable, then the comptroller shall issue to it a statement to the effect that it has complied with the act. If the contrary is found, the corporation is to be notified, and then becomes unlawful for it to sell its securities, etc., until it shall change its constitution, etc., its plan of business, etc., and its financial condition in such manner as to sati[illegible] the comptroller and Attorney General that [illegible] solvent and its plan of business is just and e[illegible]ble.

Section 5 makes it unlawful for an[illegible] company or any agent of it to sell its [illegible]rities in Florida, outside of the county where its principal office or place of business is, until it has complied with the act.

Section 6 provides that an investment corporation may appoint agents, but such agents may not sell the company's securities in Florida (outside the county wherein its principal office is) until such agent has registered with the comptroller and paid the sum of one dollar, and bond may, in the discretion of the comptroller and Attorney General, be required of such agent, etc.

Section 7 provides for statements by the company of its financial condition to be filed and filing fees therefor of five dollars to be paid.

Section 8 provides that when, at any time, it appears that the company's condition is unsound

or unsafe or it refuses to file statements, etc., its license, etc., shall be revoked.

Section 9 makes it criminal to subscribe or make false statements or entry in the company's books with design to deceive.

Section 10 makes it criminal for any person or agent to sell the bonds, securities, etc., of any company that has not complied with the act. This section, however, has this significant proviso:

> "Provided that nothing in this act shall extend to any seller of stock, bond or other security, who has purchased the same in good faith for value and who is the *bona fide* owner of such stock, bond, or other security at time of such sale."

The difference between the scope and extent of this Florida act and that of West Virginia is very apparent in many particulars.

For example:

The Florida act is confined exclusively to corporations, while the West Virginia act includes individuals, copartnerships, and associations of individuals. The Florida act restricts the corporation from selling in that state (other than in the county wherein is its principal office or place of business) only *its own* stocks, bonds, debentures, certificates, policies, or other securities of any kind or character, while the West Virginia act prohibits sale or attempt to sell *any* stocks, bonds, debentures, or other securities of any kind or character (except those specially mentioned) by any individual, copartnership, corporation, or association.

The Florida act expressly excludes from the effect of its provisions the sale of any *bona fide*

owner of stock, etc., purchased in good faith; the West Virginia act makes no such exception. The Florida act expressly permits its domestic company to sell its stock, etc., in the county in the state wherein it has its principal office or place of business; the West Virginia act permits no such exception. In short, while the provisions of both acts, to some extent, obscure and fail to define clearly their true intent and meaning as to what kind of business operations are sought to be regulated, one might well reach the conclusion that the Florida act had for its purpose the defining of terms and conditions under which corporations can do business in that state and sell its stock and bonds for the purpose of doing such business, a perfectly legitimate thing for the state to do, for its domestic corporations are simply the offsprings of its own creation, while it has long since been determined that as to foreign corporations a state exercising its sovereign power may exclude them from doing business within its territorial limits altogether. But, on the other hand, the West Virginia act must by its terms be construed to regulate individuals, copartnerships, corporations, or associations seeking to engage in the business of buying and selling stocks, bonds, and securities of "any kind or character" other than those expressly exempted. In other words, to prevent any such person, corporation, etc., from selling in the state any obligation of any corporation whether doing business in the state or not, which had not the auditor's permission to do business therein. The sweeping effect of such provision is at once apparent, as it would substantially limit the brokerage business in the state and the purchase by its citizens

of standard foreign securities which would have to be sold by them outside the state.

The decision of the Supreme Court of Florida in *ex parte* Taylor, *supra*, is expressly based upon the fact that the power is clear in the Legislature "to limit and regulate the powers and operations of corporations which it brings into existence." And because Taylor, as agent for a domestic corporation, was charged solely with offering to sell in Leon County, another county of the state than the one where the corporation had its principal office or place of business, shares of the capital stock of this domestic corporation within the statutory definition and regulation, the court held that no question of interstate commerce was presented. It further says:

> "It is manifestly competent for the lawmaking power to authorize an administrative finding whether the 'proposed place of business and the contracts of a domestic corporation' 'contain a fair, just and equitable plan for the transaction of business,' which finding will warrant administrative action duly taken under a statutory police regulation in the interest of the public welfare, unless restrained or controlled by appropriate judicial action. * * * Such regulations as those prescribed are peculiarly appropriate to corporations as classified in the statute."

We have examined the acts of Arkansas, Iowa, and Michigan, the last two of which have been subject to judicial consideration and held to be unconstitutional as hereinbefore set forth. Without enterng into detailed analysis of each, it will be sufficient to say that those of Kansas and Arkansas contain substantially the provisions of the West Virginia act. Each seek to make an "investment company" out of any individual, copartnership, cor-

poration, or association seeking to sell any bonds, stock or securities of any kind of character. The Iowa act is made expressly aplicable to "investment companies" and also to stockbrokers, defining "investment companies" as including "every corporation or concern, however constituted, now or hereafter organized, which shall sell or cause to be sold or offer for sale, take subscriptions for, or negotiate for the sale of any stocks, bonds or other securities of any kind or character to any person or persons in the state of Iowa." The Kansas act defines an "investment company" substantially to be as set forth in the West Virginia act, and in its section 10 provides:

> "Any investment company or stockbroker failing to file its report as herein provided * * * shall forfeit its right to do business in this state by reason thereof."

The Michigan act is much clearer and more logical than any of the others in that it undertakes to accomplish two things, substantially: First, to prevent "every corporation, every copartnership or company and every association" (other than those expressly excepted) from offering for sale the stocks, bonds, etc., of its own issue without permit of the securities, commission; second, to prevent any dealer in stocks, etc., from doing so until he has registered and from selling the stocks, etc., of any investment company that has not complied with the act until such dealer shall file such statements and give such information.

It goes without saying, as hornbook law, that it is the duty of the courts to endeavor to carry out the intention and policy of the Legislature, and that therefore they will not declare a statute uncon-

stitutional in whole or in part where it is reasonably susceptible of a construction giving its effect in all its parts. But it is well settled that courts must confine themselves to the construction of the law as it is, and not attempt to supply defective legislation, or otherwise amend or change the law under the guise of construction. The wisdom or want of wisdom displayed in the act is not a question for the courts, nor are the motives of the Legislature in including or omitting certain provisions. The legislative intention, however, must be the intention, as expressed in the statute itself, and it only must be given effect by the courts, otherwise they would be assuming legislative authority. For courts to violate this rule and assume legislative functions justly merits the severest condemnation. In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a well-settled rule that, so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequence, or of public policy; and it is the plain duty of the court to give it force and effect. A statute cannot in plain, common, unambiguous words say one thing and be held to mean another thing. Authority for these principles will be found in the hundreds of cases cited in 36 Cyc. 1102 *et seq.* But, in this connection, while the courts should be, and are, quick and ready to uphold legislative enactments, and where the meanings are doubtful, to solve all such doubts in favor of their validity, they have to recognize a higher and more solemn obligation to uphold and maintain the Constitutions, federal and state, upon which our government rests. These Constitutions

emanate from the people themselves and are existent by virtue of their solemn approval. Legislative acts entitled as they are to all presumptions in their favor, originate and become existent by the approval of changing bodies of men, comparatively small in number. Where therefore legislative acts plainly violate the true meaning and effective force of constitutional provisions, courts should be far more prompt and active to prevent pernicious results therefrom, by declaring them invalid, than by specious interpretation, strive to uphold them in spite of such constitutional inhibitions. In the argument of this case it was insisted by defendants' counsel that this act by interpretation should be limited in its application to corporations, and to individuals acting in concert by organization, and not to apply to a single individual conducting his own business.

How can we be expected to place this construction upon it when its first words are:

> "Every corporation, every copartnership, every company, every individual and every association (other than state and national banks, surety, or guaranty companies, trust companies, and duly authorized insurance companies, real estate mortgage companies, dealing exclusively in real estate mortgage notes, building and loan associations, and corporations not organized for profit), organized or which shall be organized in this state, whether incorporated or unincorporated, which sell or negotiate for the sale of any stocks, bonds, debentures or other securities of any kind or character other than bonds of the United States, or of some county, district or municipality of the state of West Virginia, and note secured by mortgages on real estate located in the state, to any person or persons

in the state of West Virginia, shall be known for the purpose of this act as a domestic investment company,' and then, by subsequent sections, proceeds to require such investment company to comply with terms and conditions as set forth under pain of criminal penalties."

If it was intended to apply only to corporations, why did it not stop if its first two words, "every corporation," embraced the full scope of its legislative intent? Why did it add "every copartnership, every company, every individual and every association"? Are we to adopt the conclusion that these words were only used as *ejusdem generis* with those of "every corporation"? If so, why accentuate the alleged intent by qualifying all with the words "whether incorporated or unincorporated"? How can you have an "unincorporated" corporation? How can you have an "organized" individual? If you say the word "individual" should be judicially construed out of the act and it should be held applicable only to corporations and to "individuals acting in concert by organization," the objections to it are just as valid as if the word "individual" be allowed to remain for the legal rights, under the federal and state Constitutions, by reason of personal citizenship, attach to every individual just as fully, if he conducts a legitimate and lawful business alone, or by association with other individuals. As we will point out later on, the power of the Legislature to "regulate" the business operations of corporations and those of individuals are vastly different, based upon the fact that individuals, under article 4, sec. 2, of the federal Constitution, are "citizens" of a state "entitled to all privileges and immunities

of citizens in the several states", while corporations are not. So this contention must hark back, at last, to the one that the true intent of the Legislature was that this act should only be made applicable to corporations. It is now substantially admitted that if its intent is to prevent a "citizen" from selling his own notes or other obligations, or bonds, securities, etc., which he may have acquired in the course of business, without a certificate from the auditor of solvency and "sound business capacity", it is clearly subversive of the inalienable right he has to acquire and sell property, and its validity cannot be asserted. As regards this "inte.pretation" now sought to be obtained from this court in order to save this act from its inherent constitutional defects, two things can very pertinently be noted:

First. The interpretation sought is not the one drawn from it by these state officials themselves, as shown by the facts (without substantial denial) alleged in the bill. These facts, stated briefly, are that Bracey, owning a valuable property, sold it to the Howie corporation, taking its stock in payment. When he offered to sell this stock, his own individual property, to citizens of West Virginia, he and those to whom he has sold are, at the instance of these officials, confronted with criminal proceedings for violation of this act.

Second. It cannot be for a moment questioned that the words of the first section of this West Virginia act, defining those subject to its provisions, are equally if not more particularly minute and inclusive than similar defining words contained in the Iowa and Michigan acts, with which,

and others in its provisions, this West Virginia act is largely identical. In the two cases declaring the Iowa and Michigan act to be unconstitutional, all six of the judges sitting have not hesitated to reject the interpretation now sought here and to hold the defining words to include the individuals. Says the Court in the Iowa case:

> "Coming now to a consideration of the act for the purpose of determining whether it does in express terms and undoubted meaning and intent contravene any provision of the organic law of the nation or this state, it is seen to undoubtedly prohibit any person or citizen, natural or corporate, of any foregin state, from selling or offering for sale, in person or through another, in any manner or way whatever, any stocks, bonds, or other securities or obligations, of every kind and nature, to any person within this state, unless the provisions of the act are first complied with, under heavy penalties. That is to say, by its express terms the act prohibits a citizen of a sister state of this country, owning and having stocks, bonds, certificates or securities, although the same are listed on the exchanges of the country and have a well-established actual and salable value, from either bringing or sending the same into this state for sale unless he first meets the exactions of this law, or by doing so objects himself to its penalties * * *. That the act in express terms and by inclusive definitions employed therein does so ordain cannot be gainsaid or denied. That such is the effect and purpose of the act in controversy was not disputed by the able Attorney General of the state on the argument of this cause."

In the Michigan case the court says:

> "We take judicial notice of the common understanding that this 'Blue Sky Law' was in-

tended, as is said by the Attorney General, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations.' If just this intent had been carried into effect by the act as passed, these cases would not be here; but scrutiny of the law discloses additional and very different effects. It is not confined to corporations but covers partnerships issuing, and individuals dealing in, securities; it does not relate alone to stocks, but as well to bonds, mortgages, and promissory notes; it is not limited to investment companies, as that term would ordinarily be defined, but extends the definition so that it may include most of the private corporations and partnerships in the United States; it does not cover fraudulent securities merely, but reaches and prohibits the sale of securities that are honest, valid, and safe; it does not simply protect the unwary citizen against fraudulent misleading, but it prevents the experienced investor from deliberately assisting an enterprise which he thinks gives sufficient promise of gain to offset the risk of loss, or which, from motives of pride, sympathy, or charity, he is willing to aid, notwithstanding a probability that his investment will prove unprofitable. Of course, not all of these results follow; but some of them always may, and sometimes will."

And most striking concrete instances of such effects in practical administration are then set forth.

(3) Recurring to the Florida Case, a careful study of it clearly shows that there is no conflict in principle between its ruling and those of the Michigan and Iowa cases, but, on the contrary, by implication may be held to admit their soundness and integrity. As we have shown, the Florida Statute is confined to corporations alone, selling

through their agents, their own stocks, etc., in the state, excepting, however, the county thereof wherein is its principal office or place of business, and it expressly excepts from its operation "any seller of stock, bond or other security, who has purchased the same in good faith for value, and who is the bona fide owner of such stock, bond, or other security at the time of such sale." The exercise of this control over the operations of corporations by state Legislatures is perfectly legitimate from the legal point of view, for ever since the decision in Bank *v.* Earle, 13 Pet., 519, 10 L. Ed., 274, it has been settled that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created; that such corporations are not "citizens" within the meaning of Article 4, Section 2, of the Federal Constitution, entitling them "to all privileges and immunities," as such "in the several states;" and the power of the states to determine the terms and conditions under which they, whether domestic or foreign, may do business in the state, has been repeatedly upheld, by the Circuit Court of Appeals, for this circuit in Kirven *v.* Va. Car. Chem. Co., 145 Fed., 288, 76 C. C. A., 172, 7 Ann. Cas., 219; Cumberland Gaslight Co. *v.* West Va. & Md. Gas Co., 188 Fed., 585, 110 C. C. A., 383.

A state legislature may therefore prevent foreign corporations from transacting business altogether within its territorial limits, and it may limit all corporations, foreign and domestic, as to what particular kind of business they may or may not do within the state. So far as they are concerned; it is not a question of police power nor of interstate commerce, but purely and simply the exercise of a well-recognized sovereign power over

these artificial bodies. But no such power is vested in any Legislature over either the individual citizen or over the copartnerships or voluntary associations formed or organized by him to do business. He has the equal right with any other citizen to do business in any State, and the States cannot restrict or hamper his right to engage in interstate commerce, or his inalienable right to contract, to buy and sell legitimate property.

As regards corporations, even, it may truthfully be said that comity between the states, and common sense business considerations, have practically given them unlimited permission to do business throughout the country; but this freedom should certainly not be abused to the extent of allowing them to defraud and cheat, and it may well be the jealous care and concern of the state Legislature that they do not do so. And in one sense we think this evil has been fully provided for. So far as we know, the states uniformly have criminal statutes against the procurement of money or things of value under misrepresentation, false pretences, and fraud, and the civil right of the victim of such to recover back the money or property so secured is universally upheld and enforced. In another sense some of the states may have failed to meet their moral obligation to the citizenship of the whole country in that they have indiscriminately granted charters to corporations without safeguarding its citizenship and those of sister states from unsound, fraudulent, "wild-cat," and "fly-in-the-night" organizations, forgetting perhaps the homely maxim that an "ounce of prevention is better than a pound of cure." The wisdom of making these provisions in advance, and as part of the conditions upon which the franchise is

granted, and by the state granting it, is apparent, for that it cannot be gainsaid that if all the 48 states of the Union attempt to enforce these after-incorporation provisions set forth in these "Blue Sky Laws," with all their fines, penalties, and fee exactions, against all legitimate and sound business corporations, because some states have recklessly chartered others that were unsound and conceived to cheat and defraud business conditions throughout the country will be greatly affected and injured.

(2) We do not think it can be longer questioned that stocks, bonds, debentures, and other securities are subject-matters of interstate commerce. Gibbons *v.* Ogden, 9 Wheat., 1, 6 L. Ed., 23; Brown *v.* Maryland, 12 Wheat., 419, 6 L. Ed., 678; Chy Lung *v.* Freeman, 92 U. S., 275; 23 L. Ed., 550; Railroad Co. *v.* Husen, 95 U. S., 464; 24 L. Ed., 527; Telegraph Co. *v.* Telegraph Co., 96 U. S., 1; 24 L. Ed, 708; Telegraph Co. *v.* Pendleton, 122 U. S., 347; 7 Sup. Ct., 1126; 30 L. Ed., 1187; Lottery Cases, 188 U. S., 321; 23 Sup. Ct., 321; 47 L. Ed., 492; Book Co. *v.* Pigg, 217 U. S., 91; 30 Sup. Ct., 481; 54 L. Ed., 578; 27 L. R. A. (N. S.), 493; 18 Ann. Cas., 1103; West *v.* Kansas Co., 221 U. S., 229; 31 Sup. Ct., 564; 55 L. Ed., 716; 35 L. R. A. (N. S.), 1193; Cook on Corp. (7th Ed.), Vol. 2, Sec. 486, p. 1364; A. & N. O. Trans. Co. *v.* Doyle (D. C.), 210 Fed., 173; Compton *v.* Allen (D. C.), 216 Fed., 537.

It follows that we must reject the contention that this act can be interpreted to affect only corporations, and not individuals. On the contrary, we are driven to the conclusion that it distinctly seeks to abridge and deny the rights of citizens of the United States to buy and sell property in

the state, thus depriving them of their property without due process of law; that it denies them the equal protection of the laws; and that it imposes a restraint and burden on interstate commerce contrary to the provisions of the Constitution of the United States. We do not deem it necessary to extend further discussion in support of this conclusion. The opinions in the Iowa and Michigan cases are so clear, sound, and convincing as to not only command our admiration, but lead us to the conclusion that nothing more complete and effective can be added to them.

The temporary injunction prayed for must be awarded.

Woods, Circuit Judge (dissenting). The question to be decided under this application for a temporary injunction is whether the enforcement of the statute of West Virginia approved February 11, 1913, known as the "Blue Sky Law," will violate the rights of the plaintiffs under the Constitution of the United States. The plaintiff Howie Mining Company is an Arizona corporation with an authorized capital in preferred stock of 300,000 shares and common stock of 1,700,000 shares, all of the par value of one dollar each. Its property consists of mining property in North Carolina alleged to be of great value, conveyed to the company by Smith H. Bracey in consideration of the issue to him of all the stock, both common and preferred, except four shares. The plaintiff Bracey sold some of his holdings to the other individual plaintiffs, with an undertaking on the part of Bracey, and his wife to take the stock back at an advance of 10 per cent., if so requested at the end of a year. Bracey and these purchasers from him having offered stock of the

company for sale in West Virginia, prosecutions were commenced and others threatened against them under the statute making a criminal offense the offering for sale of such stock without having filed a statement of its affairs with the State Auditor as required by the statute, and without having obtained from him the certificate provided for by section 5 of the act, to the effect that the company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business, and proposed contract or securities contain and provide for a fair, just, and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, debentures, and other securities by it offered for sale.

Thereupon this action was brought to enjoin the prosecution on the ground that the statute is unconstitutional for these reasons:

(1) By its enforcement the plaintiffs and others in like situation will be deprived of liberty and property without due process of law.

(2) The attempt is made to confer on the auditor legislative power.

(3) The attempt is made to confer on the auditor both legislative and judicial powers in violation of the Constitution of West Virginia.

(4) It denies to the plaintiffs and other citizens the equal protection of the laws.

(5) It materially and directly burdens interstate commerce.

The force of these objections depends chiefly on the construction of the statute. If it means that

no corporation, copartnership, or individual, a citizen of West Virginia or other state, can give his or its note or other obligation or sell any security he or it may have acquired in the course of busines, without a certificate of solvency, of fair transaction of business, and promise of a fair return on the paper, it would be so obviously subversive of the right to acquire and sell property that its validity would hardly be asserted in any court. Indeed, nothing but language which admitted of no other construction should induce a court to impute to the Legislature the intention to do a thing so arbitary and unreasonable. When the language of this statute is considered in view of the evil which the Legislature intended to prevent, I think the objections to it will fail. The principle that courts must reject construction of a statute, which would make it inconsistent with the Constitution if consistency with the Constitution can be found in any other reasonable construction, applies with especial force in the consideration of statutes which are intended to protect the public from prevalent frauds or to remedy evil conditions affecting the public. Courts must also recognize in such an issue the civic aspiration of enlightened people of our land, as it is expressed in legislative action by providing laws which will protect the community by holding back the evil-minded from crime, rather than by mere provision for punishment after its commission. The laudable desire and effort to this end has resulted in the enactment of many laws which seem to be novel in their scope. But novelty does not argue unconstitutionality. The power of the courts to declare such statutes invalid should be exercised with

great caution, and the presumption is always in favor of the validity of the regulations they prescribe. They should not be declared void unless they clearly go beyond the evil to be remedied and so constitute a clear invasion of the rights of the citizen. What business is affected with a public interest, and therefore the proper subject of police regulation, is primarily a matter for legislative determination. Giozza *v.* Tiernan, 148 U. S., 657; 13 Sup. Ct., 721; 37 L. Ed., 599; Rippey *v.* Texas, 193 U. S., 504; 24 Sup. Ct., 516; 48 L. Ed., 767.

The statute here involved was intended to prevent, or at least check, one of the most generally recognized and harmful evils of economic life. With increasing facilities of communication all sorts of fraudulent and visionary schemes are imposed on the public by selling stocks, bonds, and other papers, in form of securities, calling for returns on the investment. Nothing seems plainer than the right of the Legislature under the police power to provide by statute a reasonable method of having these schemes examined into by some public authority and requiring those who would sell to the public securities based on them to make a showing of good faith, solvency, and a reasonable chance of return of the investment. This I think is all that the Legislature of West Virginia has undertaken to do. The validity of similar legislation has been so often sustained that citation of authority seems hardly necessary. On the same principle rests the regulation of railroads by commissions, the inspection of meat, the condemnation of impure food, examination and inspection of cattle and fertilizers, examination and regulation of insurance companies and their con-

tracts, the inspection and regulation of markets and mines, and the regulation of the business of labor agents, and of certain classes of banks. The police power of a state extends to all regulations of its internal commerce designed to promote the public convenience or to prevent imposition or fraud, as well as those designed to promote public health, public morals, or public safety; and this too, though the regulations described may incidentally affect interstate commerce provided Congress has not acted in the particular matter. Savage *v.* Jones, State Chemist of State of Indiana, 225 U. S., 501, 32 Sup. Ct., 715, 56 L. Ed., 1182. Lemieux *v.* Young, Trustee, 211 U. S., 489, 29 Sup. Ct., 174, 53 L. Ed., 295; Booth *v.* Illinois, 184 U. S., 425, 22 Sup. Ct., 425, 46 L. Ed., 623; Chicago, etc., Ry. Co. *v.* Drainage Commissioners, 200 U. S., 562, 26 Sup. Ct., 341, 50 L. Ed., 596, 4 Ann. Cas., 1175; Wilmington Star Mining Co. *v.* Fulton, 205 U. S., 60, 27 Sup. Ct., 412, 51 L. Ed., 708; Bacon *v.* Walker, 204 U. S., 311, 27 Sup. Ct., 289, 51 L. Ed., 499; William *v.* Fears, 179 U. S., 270, 21 Sup. Ct., 128, 45 L. Ed., 186; Broadnax *v.* State of Missouri, 219 U. S., 285, 31 Sup. Ct., 238, 55 L. Ed., 219; Natal *v.* Louisiana, 139 U. S., 621, 11 Sup. Ct., 636, 35 L. Ed., 288; Slaughter House Cases, 16 Wall., 36, 21 L. Ed., 394; Assaria State Bank *v.* Dolley, 219 U. S., 121, 31 Sup. Ct., 189, 55 L. Ed., 123; Savage *v.* Jones, 225 U. S., 501, 32 Sup. Ct., 715, 56 L. Ed., 1182; Simpson *v.* Kennedy, 230 U. S., 352, 33 Sup. Ct., 729, 57 L. Ed., 1511, 48 L. R. A. (N. S.), 1151. In Patapsco Guano Co. *v.* North Carolina, 171 U. S., 345, 18 Sup. Ct., 862, 43 L. Ed., 191, the court says:

"Where the subject is of wide importance to

the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene."

The statute is to be analyzed and tested by these principles.

The first section provides:

> "Every corporation, every copartnership, every company, every individual and every association * * * organized in this state, whether incorporated or unincorporated, which sell or negotiate for the sale of any stocks, bonds, debentures or other securities of any kind or character other than the bonds of the United States, or of some country, district or municipality of the State of West Virginia, and notes secured by mortgage on real estate located in this state. * * * shall be known for the purpose of this act as a domestic investment company. Every such investment company organized in any other state * * * shall be known for the purpose of this act, as foreign investment company."

Section 2 requires that before offering or attempting to sell any stocks, bonds, debentures, or other securities of any kind or character, other than those specifically exempted in section 1 of this act, to any person or persons, or transacting any business in this state, the investment company shall file a statement of its condition and affairs with the auditor of the state.

Section 5 provides:

> "It shall be the duty of the auditor to examine the statement and documents so filed, and if said auditor shall deem it advisable he shall have made a detailed examination of

such investment company's affairs, which examination shall be made under the supervision of said auditor, and such examination shall be at the expense of such investment company, as hereinafter provided. And if the said auditor, upon his investigation, finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract or securities contain and provide for a fair, just and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds, debentures and other securities by it offered for sale, said auditor shall issue to such investment company a statement reciting that such company has complied with the provisions of this act; that detailed information in regard to the company and its securities is on file in the auditor's office for public inspection and information; that such investment company is permitted to do business in this state; and such statement shall also recite in bold type that such auditor in no wise recommends the securities to be offered for sale by such investment or security company."

It is then provided that if the auditor shall make an adverse finding on the matters of solvency, fairness, or the plan of business and the promise of a fair return on the stocks, etc., it shall be unlawful for the investment company to do business in the state until it makes such changes as shall satisfy the auditor that it meets the requirement of the law. The act then provides a penalty against—

"any person or persons, agent or agents, who shall sell or attempt to sell, or who shall offer for sale in this state any of the stocks,

> bonds, debentures or any other securities of any investment company, domestic or foreign, which has not obtained the statement provided for in section five, or the stocks, bonds or other securities of other concerns by it offered for sale, who have not complied with the provisions of this act, or any investment company, domestic or foreign, which shall do any business, or offer or attempt to do any business," without complying with its requirements.

In the first place, it seems quite clear that the statute is limited in its application to corporations, and to individuals acting in concert by organization—that is, by making a whole of interdependent parts—and was not intended to apply to a single individual conducting his own business. This is apparent from the use of the limiting adjective "organized", used in the first section of the act. Neither the absurdity of calling a single individual a company, nor the impossible thing of legislating against his doing acts when "organized", could have been intended. Not only do the words of the first section exclude the individual, but the text of the entire statute indicates an intention to apply and limit the legislation to business organizations or combinations of a number of persons. By sections 3 and 5 the application of the law is clearly limited to those who are associated together under some sort of articles or agreement of association. It is true that the first section of the statute in designaing those to be subject to its provisions uses the singular "individual"; but under the well-known rule the court should hold the plural to have been intended when that construction is required by the context as in this instance, and

especially where it will aid in sustaining the validity of the statute. People *v.* Aurora, 84 Ill., 157; Ellis *v.* Whitlock, 10 Mo., 781.

It is next to be observed that the statute does not restrict the borrowing of money or even relate to the borrowing or lending of money, but regulates, for the protection of the public, the business of those organized combinations of individuals "which sell or negotiate for the sale of any stocks, bonds, debentures, or other securities." It is vital to consider that this language cannot be construed to fetter a corporation or copartnership, or other association of individuals engaged in other business by forbidding it to sell a security acquired in the regular course of such other business; on the contrary, by its meaning appearing from the context, it limits the organizations or combinations to which it applies to whose which sell or negotiate securities as the whole or a constituent part of their business either as a temporary measure or as a permanent enterprise. Thus construed, the statute meets a very important public purpose, without undue restraint of personal liberty. Frauds or impositions in the sale of securities are not usually effected by sale to the public of the obligation of a single individual. Usually an organization is affected of two or more persons under an organization name to give the appearance of greater responsibility and to make such responsibility more illusory. When the whole or a constituent part of the business either as a temporary measure or a permanent enterprise is to raise money by the sale of the securities of such an organization to the public—that is, to any one who will buy, I am unable to find any ground for holding that

the state may not in the exercise of its police power provide for such examination into the business of the organization as is reasonably necessary to protect its citizens against imposition. The case on this point comes distinctly within the scope of the police power as defined and illustrated in the decisions of the Supreme Court of the United States above cited.

It is argued, however, that the powers conferred on the auditor are so broad and vague as to be arbitrary, in that they require him to refuse a license or certificate unless he finds that the investment company (1) is solvent, (2) that its plan of business and proposed contracts or securities contain and provide for a fair, just, and equitable plan for the transaction of business, and (3) in his judgment promises a fair return on the securities by it offered for sale. Received standards of solvency, of fairness, of the prospect of fair returns on investment are sufficiently definite for a conclusion to be reached with reasonable certainty, after investigation, that a business enterprise falls above or below them; and therefore reaching such a conclusion after investigation does not denote the exercise of arbitrary power. Certainly no objection can be made to the ascertainment of solvency, for that is now intrusted by law, without objection, to public officials in the examination of banks and other institutions. It is true that no exact standard of what is a fair plan of business and what is a promise or prospect of a fair return on a bond or other security can be laid down with accuracy. But in many ways the affairs of men depend on the ascertainment by public authority of fair valuation, fair sale, fair value, fair re-

turn on investment. Such ascertainment is required in passing on rates and management of railroads and other public service corporations by commissions; in deciding on the sufficiency of sanitation and fire protection, and on the fitness of men to practice medicine and other professions; and in passing on many other matters in which the public has a special concern. Indeed, the necessity and legality of intrusting to men the power and duty to ascertain and determine what is reasonable or fair between citizens or between the citizen and the public enters of necessity into the whole fabric of the law, not only in its judicial, but in its executive and legislative department.

The distinction between this power to determine the fairness or reasonableness of a matter or the fitness of a person which may be conferred, and mere arbitrary power which cannot be conferred, is set out and illustrated in Yick Wo *v.* Hopkins, Sheriff, 118 U. S., 356, 6 Sup. Ct., 1064, 30 L. Ed., 220, and numerous other cases.

In Gundling *v.* Chicago, 177 U. S., 183, 20 Sup. Ct., 633, 44 L. Ed., 725, the court says:

> "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence, in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrarily, interfered with, or destroyed

> without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

It is no objection to the discretionary power conferred on the auditor that he may exercise it arbitrarily; for the presumption is that he will not, and the citizen is protected from arbitrary action by the judicial power. Chicago *v.* Wellman, 143 U. S., 339, 12 Sup. Ct., 400, 36 L. Ed., 176.

Discussion of the position that the statute undertakes to confer on the auditor legislative and judicial power is unnecessary, since the point was recently decided against the contention of the plaintiff in Manufacturers' Light and Heat Co. *et al.* *v.* Lee Ott *et al.*, Public Service Commission of West Virginia (D. C.), 215 Fed., 940, on the authority of Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U. S., 194, 32 Sup. Ct., 436, 56 L. Ed., 729.

The statute only indirectly affects interstate commerce in the correction of an evil upon which Congress has not legislated. It relates to commercial transactions within the state, and places the citizens of other states on an equal footing with the citizens of West Virginia. It is not therefore a regulation of interstate commerce within the exclusive power of Congress. Minnesota Rate Case, 230 U. S., 352, 33 Sup. Ct., 729, 57 L. Ed., 1511; 48 L. R. A. (N. S.) 1151; Brimmer *v.* Rebman, 130 U. S., 78; 11 Sup. Ct., 213; 35 L. Ed., 862.

The plaintiffs have no ground to complain that the statute exempts state and national banks, surety or guaranty companies, trust companies, duly au-

thorized insurance companies, real estate mortgage companies, dealing exclusively in real estate mortgage notes, building and loan associations, and corporations not organized for profit. The classification was not arbitrary and was within the power of the Legislature. Engel *v.* O'Malley, 219 U. S., 128, 31 Sup. Ct., 190, 55 L. Ed., 128; Broadnax *v.* State of Missouri, 219 U. S., 285, 31 Sup. Ct., 238, 55 L. Ed., 219.

In Compton *v.* Allen, Circuit Judge Smith and District Judges McPerson and Pollock decided on July 6, 1914, a statute of Iowa, similar in terms to be unconstitutional; and the same result was reached in Alabama & N. O. T. Co. *et al.* *v.* Doyle (D. C.), 210 Fed., 173, as to a statute of the State of Michigan. The statutes as construed in these opinions are more restrictive of the sale of securities than we find the West Virginia statute to be. On the other hand, the Supreme Court of Florida in *Ex parte* Taylor, decided June, 1914, has held a similar statute constitutional. No case has been found which passes upon a statute precisely like that here involved. Section 4 of the act must be declared unconstitutional, in that it imposes a burden on the individual citizens of other states not imposed on citizens of West Virginia by requiring them to file an irrevocable consent that an action may be commenced against them by service of process on the state auditor. This deprives the citizens of the State of West Virginia and denies to them the equal protection of the laws. Guy *v.* Baltimore, 100 U. S., 434, 25 L. Ed., 743. But the elimination of this section does not materially affect the remainder of the statute and does not destroy the validity of its other provisions.

In my opinion the statute should be held constitutional and the injunction refused. If the plaintiffs do not fall within the terms of the statute, the fact may be proved in their defense to the indictment; but it is not available in an action to enjoin the enforcement of the statute as a nullity. Fitts *v.* McGhee, 172 U. S., 516, 19 Sup. Ct., 269, 43 L. Ed., 535; Davis & Farnum Mfg. Co., *v.* Los Angeles, 189 U. S., 207, 23 Sup. Ct., 498, 47 L. Ed., 778.

(Reported in 218, Fed. Rep., pp. 483 and 488 to 502.)

minor details have been corrected, but the new law, like the old, impresses upon interstate commerce a burden which is direct and which is beyond the limits of the police power.

The 1913 law suspended all deals for 30 days, and then, lacking actual objection, automatically withdrew legal objections. The new law forbids all dealings until after affirmative approval by the Commission. This approval would not, normally, be obtainable for several days, and it may be indefinitely withheld, without objection made or reason given, but at the mere convenience of the Commission. This change in the law has not diminished this burden, in directness or in weight.

Under the 1913 act, sales were to be forbidden, if the Commission finds that the plan of business is unfair or that the securities (a) are fraudulent, (b) will, in all probability, work a fraud upon the purchaser, or, (c) will, in all probability, result in a loss to the purchaser. The 1915 act in terms seems to eliminate the tests of unfairness and of probable loss, but in fact provides for disapproval, if the Commission finds "that the proposed plan of business of said investment company, or that its proposed contracts, stocks, bonds or other securities are fraudulent, or are of such a nature that the sale of such contracts, stocks, bonds or other securities would, in the opinion of said Commission, work a fraud upon the purchaser" (No. 9). Has there been any substantial change, or has the omission of the words "unfair" and "loss" left the statute unchanged in true intent and meaning? Obviously, the statute is now content to rest the Commission s condemnation alone on the fraudlent

character of plan or securities. They must also meet the additional test whether, "in the opinion of the Commission," the sale of the securities would "work a fraud upon the purchaser." To "work a fraud upon the purchaser" must be something different from being "fraudulent"; and the clause would seem to be difficult of interpretation save for the aid given by the history of the statute and by an additional section which first appears in the new law. (*This is No. 8. See foot-note.**) It provides in substance that the Commission may, by its own experts and physical examination, determine the value of the property in-

*"No. 8. The said commission shall have power to demand from any investment company seeking to come under the provisions of this act any further information other than such investment company is required to furnish under the provisions of this act which shall be necessary to the end that the commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may come before it. It may make or have made under its direction a detailed examination of such investment company's property, business and affairs, which examination shall be at the expense of such investment company. It may cause an appraisal to be made, at the expense of said investment company, of the property of said investment company, including the value of patents, good will, promotion and intangible assets, and it may fix the amount of stocks, bonds and securities that shall be issued by any corporation, foreign or domestic, in payment for property, patents, good will, promotion and intangible assets at the value it shall find the same to be worth and may require that such stocks and securities so issued for such property, patents, good will, promotion and intangible assets shall be deposited in escrow under such terms as said commission may prescribe. And said commission may withhold its license to sell such stocks, bonds and securities if such corporation has issued stocks, bonds and securities in payment for property, patents, good will, promotion and intangible assets in excess of their value as found by said commission or if said stocks, bonds and securities are not deposited in escrow according to the terms fixed by such commission until such stocks, bonds and securities issued in payment for property, patents, good will, promotion and intangible assets in excess of the value so found by said commission have been surrendered to such corporation and cancelled by it, and until said stock has been deposited in escrow under the terms prescribed by said commission."

volved and may prohibit the sale, unless all securities in excess of the value so determined are surrendered to the Commission; which plainly means that the Comission is, directly or indirectly, to fix the price at which securities may be sold. When this provision is read in connection with the general rule of prohibition in No. 9, it is clear enough that "in the opinion of said Commission work a fraud upon the purchaser" means "in the opinion of said Commission will in all probability result in loss to the purchaser"; and no real change in the meaning has been accomplished.

The burden of examination imposed by No. 8 need only be noticed to be appreciated. There is no limit to either the time which may be consumed or the amount of expense which may be imposed; and from the whole statute, the conclusion that interstate dealings in legitimate securities is forbidden, save at practically unregulated discretion of an administrative board, seems to us entirely clear.

The fees to be paid, the delays imposed, and the large, often very large expense involved in furnishing information and conducting examinations amount to a practical prohibition of all small dealings, and they emphasize the directness and extent of the restrictions placed on all interstate commerce in these securities.

Several serious objections to the validiy of the law are urged in addition to those passed upon in our former opinion; but it is unnecessary to consider them.

The preliminary injunction prayed for should issue; but each complainant or intervenor, before an injunction may be issued for his benefit, must give a bond to the state conditioned that in case the law should ultimately be held valid, he will pay all fees and charges required by the act. The penalty and the detailed form of all such bonds shall be as from time to time determined by the Judge of this District.

(Reported in 228 Fed. Rep., 806-808).

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

THE GEIGER-JONES COMPANY, a corporation organized and existing under the laws of the State of Ohio,
Plaintiff,

v.

EDWARD C. TURNER, Attorney General of the State of Ohio, and Henry T. Hall Superintendent of Banks and Banking of the State of Ohio,
Defendants.

No. 51.

DON C. COULTRAP,
Plaintiff,

v.

EDWARD C. TURNER, Attorney General of the State of Ohio, and HENRY T. HALL, Superintendent of Banks and Banking of the State of Ohio,
Defendants.

No. 52.

WILLIAM R. ROSE and THE RICHARD AUTO MANUFACTURING COMPANY, a corporation organized under the laws of the State of West Virginia,
Plaintiffs,

v.

HENRY T. HALL, Superintendent of Banks and Banking of the State of Ohio, CYRUS LOCHER, Prosecuting Attorney of Cuyahoga County, Ohio, and WILLIAM T. SMITH, Sheriff of Cuyahoga County, Ohio,
Defendants.

No. 53.

On Application for Temporary Injunction.

Before Warrington, Circuit Judge, and Sater and Hollister, District Judges.

Sater, District Judge:

The constitutionality of the so-called "blue-sky" law of Ohio (Secs. 6373-1 to 6373-24, General Code, 103 Ohio L., pp. 743-753, 104 Ohio L. pp. 110-119, 105-106 Ohio L. pp. 363-364) is assailed in each of the above mentioned cases, which for convenience are considered together. Statutes of a kindred character have in learned opinions been declared invalid by Federal courts sitting in Michigan (Alabama & N. O. Transp. Co. *v.* Doyle, 210 Fed. Rep., 173, Halsey & Co. *v.* Merrick, not yet reported), Iowa (Compton *v.* Allen, 216 Fed. Rep., 537), West Virginia (Bracey *v.* Darst, 218 Fed. Rep., 482) and South Dakota (Sioux Falls Stockyards Co. *v.* Caldwell). The last named case which is unreported was decided by Sanborn, Circuit Judge, and Munger and Elliott, District Judges. Although a consideration of the act will involve a reiteration of principles already ably and convincingly stated, it is thought advisable to review it in part, at least—a task rendered difficult on account of the numerous exceptions to its general provisions, and, in some instances, of exceptions to such exceptions.

The Geiger-Jones Company, an Ohio corporation, is engaged in buying and selling in Ohio and other states, stocks and bonds principally of industrial corporations, domestic and foreign. It seeks to prevent the revocations of the license heretofore granted it to transact such business and the threatened enforcement of the law against

its continued prosecution of the same. Coultrap, a citizen of the state of Pennsylvania and an agent of the Geiger-Jones Company, is the owner and holder of and a dealer in stocks of certain Ohio corporations and conducts his business in part by mail and in part by personal visits to the state. He charges that the revocation of the license of his employer will operate as a cancellation of his authority and that the contemplated enforcement of the statute will interrupt and destroy his business. Rose was heretofore arrested, indicted and convicted in one of the state courts for violating the act by selling the stocks and bonds of industrial concerns, and, particularly, the stock of his co-plaintiff, a West Virginia corporation and is now awaiting sentence. Both he and The Richard Auto Manufacturing Company allege that the enforcement of the statute by the defendants named in their bill will prevent Rose from prosecuting his business of selling securities and his co-plaintiff from completing its organization and capitalization for the manufacture of automobiles. Briefly stated, the validity of the act is assailed on the grounds that (1) it is violative of the commerce clause of the Federal constitution; (2) *it is constitutionally obnoxious in that it denies plaintiffs of property without due process of law and the equal protection of the laws;* (3) it delegates legislative and judicial power to an executive officer, *in violation of the state constitution;* and (4) it is a law of a general nature but does not operate uniformly throughout the state, as required by Section 26, Article 2, of the state constitution. If the act be unconstitutional each of the plaintiffs is, as he must be, within the

class whose constitutional rights are invaded. Standard Stock Food Co. *v.* Wright, 224 U. S., 540, 550. The prayer of each bill is for general as well as specific relief.

The act, which is entitled "An Act to regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales," prohibits, under severe penalties, the disposition of all securities subject to its provisions, without discrimination as to and regardless of their value, unless authority so to do is first obtained from the superintendent of banks (termed the commissioner). The term "dispose of" is broadly construed to mean "sell, barter, pledge, or assign for a valuable consideration or obtain subscriptions for." The first section, 6373-1, in comprehensive language declares that, except as otherwise provided in the act, no dealer may within the state dispose of or offer to dispose of any stocks, stock certificates, bonds, debentures, collateral trust certificates, or other similar instruments (all termed "securities") evidencing title to or interest in property issued or executed by any private or quasi-public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without being first licensed so to do. Promissory notes are not within the terms of the act, as was the case in the original Michigan statute. A limited number of other securities are also excluded from its provisions. The inclusive character of the act extends not only to "securities" coming within its provisions, but also to the persons subject to its exactions, prohibitions and penalties, as is evidenced by its

definition of the terms "dealer" and "company," the former embracing "any person or company" and the latter "any corporation, copartnership or association, incorporated or unincorporated, whenever organized." The term "dealer" does not, however, include national banks or any company engaged in the marketing or flotation of its own securities or any stock-promoting scheme, although such company and scheme are required to obtain the certificate of the commissioner mentioned, and must abide by all the provisions contained, in sections 6373-14 and 6373-16. A restricted number of other persons, natural and artificial, having occasion to dispose of securities, are also excluded from the classification of dealers. An "issuer" is defined to be an original issuer.

The act must be sustained unless it can be clearly shown to be in conflict with some constitutional provision. The question as to its wisdom was for the determination of the legislature; with that the court is not concerned. If the power under the Federal constitution to enact it is absent, it is unimportant how wise, necessary, or beneficient it may be, for it is then necessarily void because in conflict with the organic law of the land. Rail & River Coal Co. *v.* Yaple, 214 Fed. Rep., 273, 279, 280; Alabama & N. O. Transp. Co. *v.* Doyle, 176; Bracey *v.* Darst., 491, 492; Board of Health *v.* Greenville, 86 Ohio St., 1, 20; State *v.* Toledo, 48 Ohio St., 112, 132, 133.

If there are separate and independent unconstitutional provisions in the statute, which may be rejected, and the rest of the act be permitted to stand and have effect according to the legislative intent, the valid portions must be up-

held. But if an unconstitutional element pervades the entire statute as an inherent and essential part, it must fail as an entirety. In such a case it does not avail that the officer charged with the execution of the law may not enforce it according to its terms, but only as he may deem wise and expedient. Assent cannot be given, under such circumstances, to the proposition that although a statute may authorize the accomplishing of an unconstitutional purpose, it must, nevertheless, be presumed that it will, in fact, only be used to accomplish what can be done in accordance with the constitution. Taylor *v.* Comrs., 23 Ohio St., 22, 33, 34; Alabama & N. O. Transp. Co. *v.* Doyle, 181; Bracey *v.* Darst, 491, 492; *People* v. *Warden*, 144 N. Y., 529, 539.

Because a certificate of stock is only evidence of the ownership of shares, the interest represented by them being held by the company for the benefit of the true owner (Citizens Sav. & Tr. Co. *v.* Ill. Cent. R. R., 205 U. S., 46, 57; Bank *v.* Mfg. Co., 67 Ohio St., 306, 314), it does not follow, as defendants' counsel contend, that such certificate is of less value than an unprinted sheet of paper of corresponding size and quality, and that it cannot therefore be a subject of interstate commerce. If it be but written evidence of an interest in corporate property, the same may be said of notes and bills, which are mere evidence of indebtedness on the part of individuals or corporations that issue them. In Merritt *v.* American Steel-Bars Co., 79 Fed. Rep., 228, 235, C. C. A., 8, in speaking of stock certificates, it was said that—

> "In the business world such obligations or securities are treated as something more than

> mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

In Ohio a stock certificate is so far property that it may be seized by an officer making an attachment or levy. Sec. 8673-13, C. C.

A state law which, in its essentials, is a legitimate exercise of the police power, is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected; but, if such law directly burdens such commerce, although expressed to be a regulation under the state police powers, it must be held to be unconstitutional, for the reason that the power to regulate commerce between the states is vested in Congress. Arnold *v.* Yanders, 56 Ohio St., 417, 421; *Re* Oscar Julius, 4 Ohio C. C. (N. S.), 604, 609; Mugler *v.* Kansas, 123 U. S., 623, 661; Austin *v.* Tennessee, 179 U. S., 343, 344.

Utterances emanating from the Supreme Court and express rulings by lower Federal courts establish beyond all reasonable controversy that stock and bonds, securities whose disposition is subject to the provisions of the act, are articles of legitimate interstate commerce. Bracey *v.* Darst, 495, 496; Compton *v.* Allen, 546. Sales of them as between the states and their transmission from one state to another, whether through the mails or the instrumentality of common carriers, constitute interstate commerce. Sales may be and are effected by telegraph, telephone, correspondence, traveling salesmen and the issuers or investment companies directly or through their local or branch houses. The se-

curities may be delivered by such salesmen or branch houses at the time sales are made or subscriptions taken, or by the issuers or investment companies by means of any of the known and usual agencies for transmitting such instruments from one state to another.

Whether interstate transactions in the securities whose disposition is within the purview of the act directly burdens interstate commerce must be determined by testing its provisions by the Federal constitution. The act (Sec. 6373-3) requires as a condition precedent to the authorization and right of an applicant to do business in the state that such applicant shall submit, with a filing fee of five dollars, to the commissioner, (a) the names and addresses of the applicant's directors and officers, if the applicant be a corporation or association, and of all partners, if it be a partnership, and of the individuals, if it be such, and also the names and addresses of all agents of such applicant, assisting or about to assist in the disposition of securities; (b) the location of its principal office without and within the state, if it have both; and (c) the general plan and character of its business, and references as to its suitability to transact such business, which references the commissioner "shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant's directors, officers and agents." If the applicant be a foreign corporation, having its principal place of business beyond the boundaries of the state, it must also file a duly certified copy of its articles of incorporation, regulations and by-laws, and, if it be an unincorporated association, a certified copy of its articles of association

or deed of settlement. Every applicant must also submit to the commissioner an irrevocable written consent to litigate in the courts of Franklin County only any action brought against him on account of any fraudulent disposal of securities by him or his agents, and also to be bound by service of process made personally or by registered mail. Notice of all applications for registration as a licensed dealer in securities must be published at the expense of the applicant in a daily newspaper of general circulation, and a further payment of an annual fee of fifty dollars is exacted should a license be issued. An amended license is necessary whenever the name of an agent is added to or stricken from the original, a payment of five dollars being exacted in the first instance and of two dollars in the latter. Notice of each amendment to the license must be published at the licensee's expense. The commissioner may at any time revoke any license or refuse to renew the same upon ascertaining—the manner of which is not stated—that the licensee is of bad business repute, has violated any provisions of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions. He is required to give at least five days' notice of his intention to revoke or to refuse to renew or grant a license, but the licensee or applicant, as the case may be, is not accorded a hearing. Following the refusal or revocation of a license, the applicant or licensee, as the case may be, may contest in the Franklin County court the correctness of the commissioner's ruling, but must assume the burden of disproving the grounds assigned as the basis of his official action, and must

also meet any additional reasons which the commissioner may plead in justification.

Notwithstanding the granting of a license to an applicant, it may not dispose of any given securities until it has also filed, unless excused by the commissioner from so doing, a further statement (Sec. 6373-9) touching the issuer of such securities, if the issuer be a company, setting forth (a) its name and the location of its principal office and the names of its officers and directors, or, if it be a copartnership, the names of the partners; (b) a general detailed showing of its assets, liabilities, and capital stock, as of a date not later than the close of the last fiscal year, and also of its gross income, expenses and fixed charges for the year last prior thereto, or for such other time as the issuer has been in business, if that time be longer than a year; (c) a pertinent description of such securities and the purpose of their issue; and (d) the approximate price at which the licensee proposes to dispose of them. The exemptions from the filing of the information called for by such section which the statute permits the commissioner to grant are enumerated in Sec. 6373-10. In most instances they are so qualified as to relieve but a limited number of licensees and introduce a fatal inequality as regards the protection of the laws guaranteed by the fourteenth amendment.

The statute further provides that no issuer or underwriter, nor any person or company acting in behalf of either (Sec. 6373-14), shall, within the state, for the purpose of organizing or promoting any company or of assisting in the flotation of its securities, dispose or attempt to dispose of any such securities until the commissioner has issued a certficate permitting such to be done, the granting of

which must be subsequent to the issuer or underwriter filing an application (except in certain instances which need not now be noted), with a fee of five dollars, containing the information required by paragraphs (a), (b), (c) and (d) of Sec. 6373-9, a certified copy of the issuer's articles of incorporation or association, regulations, and by-laws, of all minutes of stockholders and directors relative to the issuance of such securities, of any contracts which have been made between the issuer and its underwriter of such securities (copies of all such subsequent contracts also to be filed when made), and of all contracts between any underwriter and any sales agent or broker, and also a sworn statement made by the president and secretary of the issuer showing in detail the items of cash, property, services, patents, good will, and any other consideration for which such securities have been or are to be issued in payment. The commissioner (Sec. 6373-16) may, as he deems advisable, examine the issuer of such last named securities at any time, both before and after his grant of the certificate named in Sec. 6373-14. In the exercise of his discretion, he may require all or any part of the expense of such examination to be borne by the applicant, who is compelled to deposit with him in advance for such purpose whatever sum he may order. The applicant receives an itemized statement of expenditures made, but this follows the conclusion of the examination. If the commissioner finds that the applicant has complied with the law, is not fraudulently conducting its business, is not proposing to dispose of its securities on grossly unfair terms and is solvent, a certificate authorizing the disposal of such securities shall issue, providing, except in case of a licensed dealer, a

fee of ten dollars be paid, but, if the commissioner does not affirmatively so find, the certificate must be refused. It must be issued or denied within a reasonable time after application for it is made, which time shall be within thirty days after the applicant or certificate holder, whose certificate has been revoked, has fully complied with all the requirements of the act, but the commissioner is the sole judge of what constitutes compliance, and as the examination, especially of large concerns, would in some instances be prolonged and at times have to be conducted at distant points in this or another country, the issuing of a certificate may be delayed indefinitely and beyond the thirty day period. After the applicant is authorized to proceed with its proposed business, the commissioner may still revoke its certificate and deny it the privilege of continuing to dispose of the securities in question, if he has reason to believe that the certificate holder's business is fraudulently conducted, or that the securities are disposed of upon grossly unfair terms, or that the issuer is insolvent, the right to review his action being again restricted to the Franklin County court. Whether such "reason to believe" shall be the result of an orderly examination of the issurer's conduct and affairs, or be otherwise acquired, does not appear.

Violation of the act constitutes a misdemeanor or felony, regard being had to the character of the offense, and is visited by a fine of imprisonment, or both.

In International Text Book Co. *v.* Pigg, 217 U. S., 91, and Buck Stove Co. *v.* Vickers, 226 U. S., 205, 213-216, a Kansas statute, akin to the Ohio act, but less drastic, was held to impose a direct burden on legitimate interstate commerce and to be

violative of the commerce clause of the Federal constitution not only on account of the license required as a condition precedent to the right to transact a lawful business, but because it is not competent for a state legislature to prescribe as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock, authorized and paid up, and its par and market value, as to its assets, liabilities, officers, trustees, directors, managers, and stockholders, with a showing of the stockholdings of each of the latter and the amount paid on his holdings, and the post-office address of all of such above named persons. A quite similar but (as regards the parties at whom it was aimed) a more comprehensive statute in that it ran not only against express or transportation companies incorporated by any foreign government, but, like the present act, also against any association or partnership acting under the laws of any foreign government, was likewise denounced in Crutcher *v.* Kentucky, 141 U. S., 47, in a well reasoned opinion which is freely quoted in the Pigg case. The draughtsman of the act here in question, unwittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above named case, and added others equally, if not more, obnoxious. The burdens which it imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its

various parts as to be inseparable. The enforced suspension from all business activity for a period of thirty days, imposed by the original Michigan act, was held to be a fatal "30-day paralysis." In the latter decision rendered by the same court (Halsey & Co. *v.* Merrick) the subsequent act of that state was overthrown, notwithstanding the absence of such restrictive provision. In the present act the prohibition from the transaction of business must extend for a week, and possibly twenty or thirty days, or more; it therefore offends against the constitution quite as much as the first of the Michigan acts.

The act must be further tested by its effect upon the citizen's right to pursue a lawful calling. The natural right to life, liberty and the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the public welfare, health or prosperity. But, however viewed, the act transcends the legitimate exercise of the police power and violates the due process clause of the constitution. There is a fundamental distinction between what Mr. Justice Bradley termed, in Butchers' Union Co. *v.* Crescent City Co., 111 U. S., 746, 763, the ordinary occupations and pursuits of life, forming the large mass of industrial avocations which are and ought to be free and open to all, subject, only to such general regulations, applying equally to all, as the general good may demand, and the kinds of business and transactions which are affected by a public interest or arise from public grant or exist by public sufferance. Of this latter class are the liquor traffic, grain elevators, inn-keepers, warehouses, ininerant peddlers, insurance, motion picture shows, con-

cerns exercising public franchises, and the like, all of which it is competent for the state law-making power to regulate and within proper bounds subject to executive license and control, as the interests of society may require. To the former class, with which alone we are now dealing, belongs the right in good faith to buy and sell securities and to fix their price by agreement, either in individual transactions or in the course of repeated and successive transactions of a similar character, a right which, when so exercised, is both property and liberty and which cannot be made subject to either executive grant or denial. City of Cleveland *v.* Construction Co., 67 Ohio St., 197,219. In Allgeyer *v.* Louisiana, 165 U. S., 578, 589, it was said that the liberty mentioned in the fourteenth amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livlihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." If an issuer or owner of or dealer in securities issued in good faith and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal or of offering them for disposal, he is deprived not only of his property within the meaning of the constitution, by taking from him one of the incidents of ownership (City of Chicago *v.* Netcher, 183 Ill,. 104, 110), but also of his liberty, as appears from Mr. Justice Matthews' saying in Yickwo *v.* Hopkins, 118 U. S., 356, 370, that

> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoymen of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Legitimate commercial transactions, such as the disposal of securities of the kind above mentioned, cannot be regulated by legislative enactment. The act in question seeks to regulate private transactions, but the person, natural or artificial, that sells securities based upon reasonable value, is entitled to the protection of the same safeguards as the man who sells clothing, dry goods, groceries, or hardware, or engages in any other private business that is not affected by a public interest. As was fittingly said in the Doyle case (p. 179):

> "The issuing of * * * stocks or bonds by a private company to get money for its own business, no one can suppose is a public or quasi-public enterprise; the business of buying and selling stocks and bonds or other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for frauds sufficiently characterize the business to justify its entire prohibition save under drastic restraint."

Every proposed offering of securities must first be submitted to the commissioner subject to the delay incident to his investigation or examination which, should he temporarily grant a license or a certificate, may thereafter be continued and repeated, and, in case of an issuer

mentioned in Sec. 6373-16, at its expense, limited only by his unrestrained discretion. Every investigation and examination authorized is *ex parte*. The applicant, whether a dealer or issuer, is not permitted to be heard as to the granting or revocation of a license or the award of a certificate, on the important questions of his own good repute, his alleged or surmised violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms under which his disposals are made, or his own solvency. No rules of procedure are prescribed in accordance with which the investigation or examination shall be made, nor is the commissioner required to establish any rule or regulation as to what shall constitute good repute, solvency, or fraudulent conduct. He may at will deal with each case as it arises and vary his course to suit his pleasure. He is at liberty to hear, if he chooses, only evidence unfavorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even the whim and caprice (if he gives them play) of the commissioner or of his assistant (subject to the commissioner's supervision) may not only halt, but injure and perhaps destroy a worthy business enterprise and cast a cloud on the name of the applicant or licensee, and when such applicant or licensee seeks redress in the courts he must assume the burden of disproving the findings made against him, however groundless they may be. Even an effort is in effect made to deny him access to the Federal courts. Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. Rep., 1, C. C. A., 8. In given respects the above named law is more

severe than that of any of the states whose "blue-sky" laws have been held unconstitutional. They afforded some opportunity, at least, to the applicant to be heard when his right to do business was under investigation, and when his business and good name were assailed, opened to him the doors of all the courts of the state for redress against adverse rulings and limited the burden of cost to which he might be subjected in consequence of an examination into his affairs.

A police regulation, like any other law, is subject to the equal protection clause of the fourteenth amendment. Atchison & Santa Fe Ry. Co. *v.* Vosburg, 238 U. S., 56, 59. A statute does not deny the equal protection of the law if all persons brought under its influence are treated alike under the same conditions (Missouri Pac. Ry. Co. *v.* Mackey, 127 U. S., 205, 209), and if it does not subject the individual to an arbitary exercise of the powers of government (Duncan *v.* Missouri, 152 U. S., 377, 382). The following illustrates wherein the act fails to meet the test thus prescribed: If more than fifty per cent. of the bonds of a given issue by a corporation are included in a sale to one purchaser such issue, is not embraced within the act (Sec. 6373-2) (a). The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the onerous provisions of the law, although its securities may be of the highest financial character. An owner who is not the issuer of the securities he holds is at liberty to dispose of his holdings for

his own account regardless of the statute, providing he can do so without resorting to repeated and successive transactions of a similar character; but, if such transactions are expedient or necessary, he may not sell, unless, at inconvenience and financial cost and through delay and the commissioner's approving stamp of "good repute in business," he obtains a dealer's license so to do. A natural person who has not underwritten and is a *bona fide* owner of his securities, whether he be of good repute or not in business, may dispose of them for his own account, but the underwriter, although he may possess the same moral qualities and wealth as the natural person, or out-rank him in both of these respects, may not dispose of his holdings, except by compliance with the none too clear provisions of the act. Although a natural person may dispose of his holdings as above indicated, a partnership or association may not do so. The exemptions based on market reports of a daily newspaper of general circulation (Sec. 6373-10 (b) and (c), would fail to embrace large numbers of meritorious issuers of the different classes of securities, for it is well known that many secruities are not listed on the market or mentioned in any standard manual of information. Sec. 6373-10 (c) can have no application to an issuer, if some disposee is found who in a single transaction acquires securities of a given issue to the amount of five thousand dollars or more. There are many worthy concerns, each capitalized for a considerable sum, in which no one's investment reaches that amount. There would moreover seem to be no reason why, if some one person who, risking that sum, should be defrauded, others should be cheated of

smaller sums by sales of stock without the supervision which the law is intended to provide. A licensee may be relieved from giving information concerning the issuer of securities (Sec. 6373-10) (f), if the disposal of such securities is at less than one per cent. of their par value through a licensed member of a regularly organized and recognized stock exchange, having an established and lawfully conducted place of business in the state regularly open for public patronage, of all of which the commissioner is the sole judge. He may not be thus relieved, if the disposal is made by any one else.

The above observations upon the act have been made with full appreciation of Sec. 2, Art. XIII, of the Ohio constitution as amended September 3, 1912, the pertinent portion of which provides:

> "Corporations may be classified and there may be conferred upon proper boards, commissioners or officers such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law."

It is to be regretted that the Supreme Court of Ohio has not been called upon either to construe this provision or to pass upon the statute now under consideration nor have we had the benefit of the discussion of this constitutional provision by counsel. We are, however, impressed with the belief that the provision cannot be so construed as to change the conclusions we have reached concerning the operation and effect of the statute. The effect of the constitutional provision, in our judgment, is simply to give distinct expression to

powers which were plainly implied under the same section and article of the constitution of 1851, which provided that—

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

It is settled by Berea College *v.* Kentucky, 211 U. S., 45, 57, that—

> "A power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. Commissioners on Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass., 446, 451; Holyoke Co. *v.* Lyman, 15 Wall., 500, 52; Close *v.* Glenwood Cemetery, 107 U. S., 466, 476."

It was there further held that while the language of a statute may not in terms amend a charter, yet, where such appears to have been the legislative intent, the statute will be regarded as an amendoment, Mr. Justice Brewer saying (p. 57):

> "It would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated."

It is also settled that where such power to alter or repeal a charter is reserved, it is competent for the legislature to repeal the charter as well as to amend it. Greenwood *v.* Freight Co., 105 U. S., 13; Hamilton Gas Light & Coke Co. *v.* Hamilton

City, 146 U. S., 258, 269, 270, 271; Shields *v*. State, 26 Ohio St., 86, 93, 94, affirmed 95 U. S., 316, 324; State *v*. City of Hamilton, 47 Ohio St., 52, 73, 74. The most, then, that can be said of the statute in question is that its provisions operate to amend the articles of incorporation, the charters, of all domestic corporations that are in terms affected by the provisions of the act. It inevitably follows that these reserved powers include the power to supervise and regulate corporations. The consideration then of the present statute cannot be aided upon any theory that Sec. 2, Art. XIII, as amender, vests in the state legislature any greater power than it possessed under the old section and article; for manifestly there can be no difference between an express power and an implied powed to do the same thing. It results that the constitutional validity of the present statute is to be tested by considerations practically the same as it would have been prior to the amendment in question. For example, a state is without power either through constitutional or statutory provision to avoid the effect and force of the commerce clause of the Federal constitution; it hardly need be said that the statutory provisions before pointed out which directly impose burdens upon interstate commerce are of necessity violative of that clause; and, apart from everything else, it cannot be presumed that the legislature would have enacted the statute if it had understood that the provisions aimed against foreign corporations could not be sustained, since this alone would work an obvious discrimination against domestic corporations. Again, the power to supervise and regulate the business here involved was never before and cannot now be understood to signify authority so to burden the

business of domestic corporations as in practical effect to destroy it, regardless of its actual character and merit. We are not to be understood by anything said in this opinion to intimate that it is not within the power of the state legislature reasonably to regulate the business of corporations of its own creation or that of foreign corporations and joint stock companies which are operating within the borders of the state (Alabama & N. O. Transp. Co. *v.* Doyle, 186, 187; Bracey *v.* Darst, 494, 495), such power of regulation being more extensive as to such artificial entities than as to individuals, copartnerships and voluntary associations. We do mean, however, to say, as we have already in effect stated, that the things attempted to be done by the present statute cannot be sanctioned under the guise of "supervisory and regulatory" measures in respect of the business of issuing and selling stocks and securities, whether of domestic or foreign corporations.

Other features of the act and other points argued have been considered; the treatment of the one and the discussion of the other would prolong this lengthy opinion and are not necessary.

The licenses mentioned in the first two of the above entitled causes expired on December 31, 1915. No occasion, therefore, exists, for enjoining their cancellation. The bill in each of them is drawn on narrow lines. The prayer of each, however, taken in conjunction with certain averments, is such as to warrant the temporary enjoining of the defendants therein named against enforcing or attempting to enforce the statute in question. In the third of the above cases, the motion filed by the defendants to dismiss is overruled. A temporary injunction is awarded in each case.

(Reported in 230 Fed. Rep., 235-247).

Supreme Court of the United States.

Nos. 438, 439 and 440, October Term, 1916.

(438) Hall *v.* Geiger-Jones Co.
(439) Hall *v.* Coultrap.
(440) Hall *v.* Rose.

Now comes Robert R. Reed, counsel for *Investment Bankers Association of America,* and moves the Court for leave to file a brief in the above entitled cases as *amicus curiae.*

ROBERT R. REED,
Counsel for Investment Bankers
Association of America.

Sir:

Please take notice that, as counsel for the Investment Bankers Association of America, I shall move this Court, at the October, 1916, Term thereof, to be held at the Capitol of the United States in Washington, District of Columbia, on the 9th day of October, 1916, at the opening of the Court on said day, or as soon thereafter as I can be heard, for leave to file a brief in the above entitled cases as *amicus curiae.*

Dated, New York City, New York, Sept. 21st, 1916.

ROBERT R. REED,
Counsel for the Investment Bankers
Association of America.

To

Honorable Edward C. Turner,
Attorney General of the State of Ohio.

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IN THE

Supreme Court of the United States

October Term 1915.

No. 438.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO,

Appellant,

vs.

THE GEIGER-JONES COMPANY.

No. 439.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO,

Appellant,

vs.

DON C. COULTRAP.

No. 440.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO; CYRUS LOCHER, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO, AND WILLIAM T. SMITH, SHERIFF OF CUYAHOGA COUNTY, OHIO,

Appellants,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO MANUFACTURING COMPANY.

BRIEF FOR APPELLEES.

INTRODUCTION.

Two considerable portions of the brief of counsel for appellant relate to questions which are not involved in this case. In the cases of Coultrap and The Geiger-Jones Company a license had been issued by the commissioner, and it was alleged that the attorney general was about to advise him to revoke it and that he was about to follow the advice, and an injunction against that proceeding was prayed for. The bill also alleged generally the threats to enforce this law against those plaintiffs and the grounds for its unconstitutionality were alleged and there was a prayer for an injunction against such enforcement and for general relief. There was no temporary injunction allowed to restrain the attorney general from advising the cancellation of the license. This license which had been issued expired on the last day of December, 1915, before the entry of the decree from which this appeal was taken and before the decision of the case by the court. Therefore, the question of the proceedings to revoke the license has disappeared from the case. And, as no restraining order was issued against the attorney general at any time, there is no question before this court on appeal as to the propriety of such a restraining order.

In the other cases there was in connection with the general allegations of the threat to enforce this statute and the allegations of the grounds of its invalidity, the further allegation that Rose had been indicted for offering securities of the RiChard Company for sale, that he had been tried, a verdict of guilty returned and a

motion for a new trial filed. There was a prayer to enjoin the further prosecution of that suit and for an injunction against the enforcement of the act as against either Rose of the RiChard Company and a prayer for general relief. The restraining order granted by the district judge expressly provided that it should not operate to enjoin the further prosecution of the indictment against Rose. The same condition was embraced in the interlocutory injunction allowed in the decree from which this appeal is taken, and, therefore, the question of the right to enjoin that proceeding is not in the case.

We may make further progress by eliminating from the brief of counsel for appellant groups of cases which seem to have no relation whatever to the present case. Types of them are, The German Alliance Insurance Company vs. Kansas, 233 U. S. 389, where after a careful analysis of the subject the court itself fixed the boundaries of the precedent which it was establishing, when at page 414 it said:

> "We have shown that the business of insurance has very definite characteristics with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent."

Also besides the considerations here involved are the cases of Rast vs. Van Deman & Lewis Company, 240 U. S. 342, and the group of cases considered and reported with it. These cases involved a consideration of the legal character and status of sales with coupon or trad-

ing stamp devices. After a careful analysis of all those devices and the distinctions between them and the normal contracts of commerce they were held to be subject to restraining legislation by the state, because "they tempt by a promise of value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence,"—a conclusion which would probably meet the prompt assent of every lawyer who has ever purchased a handful of cigars at a stand of the United Cigar Company, and has reflected upon the character of the transaction.

THE CONTRACTS RESTRICTED BY THIS ENACTMENT ARE THE NORMAL CONTRACTS OF COMMERCE.

The enforcement of the act against the original complainants was enjoined in the court below because it is violative of the constitutional provisions relating to due process of law, the equal protection of law, the preservation of liberty and the immunity of interstate commerce from state interference.

Neither among the judges who sat in the court below nor among counsel engaged in the case does there appear to be a confident opinion respecting the interpretation of some of the provisions of the act. Its title is misleading, its purview and general form are unusual and much of its subject matter lies within the domain of judicial proceedings for the appointment of guardians of the estates of adult persons who are adjudged to be **non-compotes.**

It is entitled "An Act to regulate the sale of bonds, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales." This attractive title may have been very helpful in securing the legislative votes required to pass the act, but it pays small regard to its provisions. The most attractive title of which the provisions of the act would admit would be: An Act to condition and prohibit commerce lest in its conduct sellers might in some instances practice fraud and in others purchasers might sustain financial loss from the exercise of defective judgment.

The purview of the act is contained in Section 1. It clearly gives to the act a scope which will not admit of its vices being minimized as is attempted by our adversaries. "Except as otherwise provided in this act, no dealer shall—dispose or offer to dispose of any stocks, bonds, mortgages or other instruments evidencing title to or interest in property or other securities of any kind or character, etc.", clearly requires us to look to the exceptions of the act, not for the transactions which are prohibited or conditioned, but for those which are free. Our analysis of the act is mainly identical with, and in all respects consistent with, that given in the opinion of the court below. Provisions, which in our view, render the act clearly void, are found:

1st. In the arbitrary power conferred upon the commissioner to grant or refuse licenses to anyone seeking that indispensable authority to carry on an ordinary calling and to exercise his guaranteed right of contract.

2nd. In provisions to authorize the commissioner to place forbidden restrictions and burdens on the conduct of his business by one who has obtained a license.

3rd. In provisions to confer upon the commissioner arbitrary power to revoke licenses.

Two vices in their influence pervade the entire act:

First, as a condition of obtaining a license every applicant is required to waive his right to the equal protection of the law.

It is provided in subsection "e" of Section 6373-3 that at the time of making application for a license the applicant "Shall also file with said commissioner a duly executed written instrument, irrevocable, consenting that any action brought against him arising out of and founded upon the fraudulent disposal of such securities by him or his agents may be brought in Franklin county, and that in the event that proper service of process cannot be had upon such applicant in such county, service of process made therein by the sheriff of such county by sending a copy thereof by registered mail at least thirty days prior to taking judgment in such case, addressed to such applicant at the place of his principal office named in his application, or such other place as the applicant may thereafter designate in writing filed with the commissioner, shall have the same effect as if personally made upon the applicant according to the laws of this state." Thus the applicant is required, as a condition to obtaining a license, to file an irrevocable waiver of his right to the equal protection of the laws. For, by the laws of this state, except upon a joint contract, a man cannot be sued except either in the county of his residence where summons may be served either personally or by leaving a copy thereof at his place of residence, or in a county to which he may have voluntarily gone where summons may be served personally.

This objection to the act was made by us in the court below where it was held to be a denial of the equal protection of the law. To all this counsel for the appellants have nothing to say except that the legislature of a state may provide by law where suits shall be brought. That can hardly be even offered as an answer to the objection that all the citizens of a state must be affected alike by such legislation, else they do not have the equal protection of the law required by the Fourteenth Amendment.

Second. The act attempts to confer upon the commissioner arbitrary power or authority to exercise legislative power.

By the act there has been no attempt to exercise legislative power in prescribing the qualifications of the person who may be entitled to receive a license to exercise dominion over his own property or to engage in interstate commerce. Both standards of qualification in a licensee and compliance with them are left to the exclusive and arbitrary will of the commissioner. Whether the act is condemned as a forbidden attempt to delegate legislative power, as has been done in some cases, or as an attempt to confer arbitrary power, as in others, it is in this respect violative of all the guarantees which we invoke.

The applicant for a license has no right to a hearing upon his application, nor has the holder of a license a right to be heard upon notice looking to its revocation.

It exacts from every applicant for a license a filing fee of $5.00 and an annual license fee of $50.00.

The applicant must also submit the names and addresses of its directors and officers, if a corporation, and of all partners, if it be a partnership, and of the indi-

vidual, if it be such. Also the names and addresses of all agents of such applicant assisting or about to assist in the disposition of securities; the location of its office without the state and within if it has both; the general plan and character of its business and reference as to its suitability for the transaction thereof, which representations the commissioner "Shall confirm by such investigation **as he may deem necessary**, establishing the good repute in business of such applicant, directors, officers and agents, the provision of the act being:

> "If the 'commissioner' be satisfied of the good repute in business of such applicant, directors, officers, partners and agents, he shall, upon the payment of an annual fee of fifty dollars, and five dollars additional for each agent named in the application, register the applicant as a licensed dealer in such securities, and issue to him a license, containing the name of the applicant and all such agents, renewable annually upon the payment of such annual fee, unless revoked as herein provided. The expense of all publications provided for in this act shall be paid by the applicant for license."

In a less flagrant case legislation of this character has been judicially condemned in numerous cases. In Harmon v. State, 66 O. S. 249, an act was held to be void because in like terms it attempted to confer authority upon an administrative officer, called an "examiner," to determine arbitrarily who might receive licenses to pursue the calling of steam engineers. Since steam plants, managed by the unskillful or careless, are sources of danger to the public, the subject of that act was clearly within the police power, while, in our view, the subject of the present act is clearly excluded from it. The act was nevertheless held to be unconstitutional because of the

attempt to confer arbitrary power upon the examiner in these terms: "If upon examination the applicant is found trustworthy and competent, a license shall be granted him to have charge of, or to operate any steam plant."

The court said: "By this section the examiner is made exclusive judge as to whether the applicant is trustworthy and competent. No standard is furnished by the General Assembly as to qualification and no specifications as to wherein the applicant shall be trustworthy and competent, but all is left to the opinion, finding and caprice of the examiner. He is the autocrat with unlimited discretion, without rules prescribing the qualifications of applicants for licenses; etc."

It may be doubted whether such legislation has ever been sustained among a people supposed to be free. It has been vigorously and consistently condemned by the courts of this country in cases so numerous that their collection would be the appropriate work of a compiler of a digest. Among them are:

City of Richmond vs. Dudley, 129 Ind. 112.
Bills vs. The City of Goshen, 117 Ind. 221.
Mayor vs. Radecke, 49 Maryland, 217.
State vs. Tenent, 110 North Carolina, 609.
State ex rel., Gambad vs. Deering, 84 Wis. 585.
Cicero Lumber Co. vs. Town of Cicero, 176 Ill., 9.
Noel vs. The People, 187 Ill. 587.
Yick Wo vs. Hopkins, 118 U. S. 356.
Butcher's Union v. Crescent City Co., 111 U. S., 746.
Allguyer vs. La. 165 U. S., 578.

In the city of Richmond v. Dudley, 129 Indiana, 112, the court adjudged the invalidity of a city ordinance placing restrictions on the keeping and storing of in-

flammable and explosive oils, and on pages 114 and 115 it was said:

> "It will be observed that this ordinance does not establish any general rules for the storage of the substances proposed to be regulated, and reserves to itself, at regular meetings the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose, and the person presenting the petition a "proper person." It further provides that the permission when granted, 'may be revoked at any time at the option of the council.'
>
> Language better calculated to enable the common council to arbitrarily control the business without any fixed or known rules, cannot well be imagined. The business of keeping, storing and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen."

In Mayor vs. Radecke, 49 Md. 217, the court adjudged the invalidity of an ordinance regulating the use of steam engines. Recognizing that the subject was within the regulatory powers of the state and municipality, it adjudged the ordinance to be void, saying at page 230:

> "It does not profess to prescribe regulations for their construction, location or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box-factories and other similar establishments within certain definite limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the transaction of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's

disobedience to such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, **or partiality and oppression prevented.** It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others over whom they are withheld may acually be benefited what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment of consideration. In fact, **an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.**"

In People ex rel. Moskowitz vs. Fred Jenkins, 202 New York, 53, the court held that Section 85 of the general municipal law, which prohibited the conducting of a transient retail business for the sale of goods which shall be represented or advertised as a bankrupt stock, or an assigned stock or as goods damaged by fire, water, or otherwise, etc., without first taking out a license, cannot be sustained as an exercise of either the police power or the power of taxation, and hence is unconstitutional, and the action of city authorities thereunder invalid. On page 56, Cullen, chief justice, said:

"The only branch of that power (the police power) under which it is contended that the present statute

can be upheld is for the prevention of fraud. If it is reasonably, though mistakenly, directed to that object, it is good. It seems to me, however, to have no such purpose. It is said that the representation that the goods in question are a bankrupt or a damaged stock induces customers to believe that they are of a high grade or quality and will be sold cheap and for much less than their original cost, while as a matter of fact they are of an inferior grade. That the representation may induce customers to believe that they can get a bargain may be assumed, but the representations enumerated in the statute have no relation to the quality and character of the goods, or, if any, certainly not to enhance or exaggerate such character. It can be readily seen how a statement that a stock of goods had not been damaged by fire, water or otherwise, might constitute a fraudulent representation as to their character or condition, but it is not easily perceived how a statement that they had been damaged could constitute such. But even though a statement that they had been damaged would be held an immaterial allegation in an action at law for fraud. I concede that no vendor has the right to tell a falsehood as to his goods, be it material or immaterial, and that the legislature may properly pass laws to prevent or punish false statements, but the legislation before us does nothing of the kind. If a man pays his license fee, he may sell the goods without penalty though his statement that they are damaged or bankrupt stock is entirely untrue. He may utter any falsehoods concerning his goods other than those mentioned in the statute and he may sell without a license fee. But a vendor may own goods which have been purchased at a sale of a bankrupt, or damaged by fire, and he has the unqualified right, to sell them and the unqualified right to tell the truth about them. He cannot under the exercise of the police power be prohibited from enjoying both those rights. "The right to buy, sell, barter and exchange property is a necessary incident to its ownership, and subject to reasonable regulations, is as much protected by this provision of the constitution as is the ownership itself."

In State vs. Tenent, 110 North Carolina, 609, the court held that an ordinance of the city of Ashville prohibiting the improvement or changing of a building without first obtaining permission from the board of aldermen was void. On page 612 it is said:

> "Police power may be exercised by the sovereign state through the General Assembly in derogation of the absolute right of the individual only for the general benefit, and by means of statutory provisions that upon their face operate indiscriminately upon, and are enforceable by the same species of process against all persons and classes. State v. Moore, 104 N. C. 721; State v. Chanbers, 93 N. C. 600; State v. Stovall, 103 N. C. 416; Diset v. West Virginia, 129 U. S. 114; Mogler vs. Kansas, 123 U. S. Rep. 623. 'Towns and cities cannot use their power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the state who may come or live within the corporate limits.' State v. Pendergrass, 106 N. C. 664; State v. Summerfield, 107 N. C. 898; 1 Dillon, Sec. 380 (313).
>
> It is equally clear that if an ordinance is passed by a municipal corporation, which upon its face, restricts the right of dominion which the individual might otherwse exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons. Newton v. Belger, 143 Mass. 598."

In Bessom vs. City of Indianapolis, 71 Indiana, page 189, the court adjudged the invalidity of an ordinance regulating hospitals. On page 198 it is said:

> "It is sufficient to say, that, if the ordinance is valid, the common council and board of aldermen

> have it in their power to grant one person a license, and refuse another under the same circumstances. No law could be valid which, by its terms, would authorize the passage of such an ordinance. The 23rd section of the Bill of Rights provides that 'The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same trems, shall not equally belong to all citizens.' What the legislature cannot do directly in this respect it can not authorize a municipal corporation to do."

In all of these cases and many others of like import the courts appear to have been guided by the conception so vigorously expressed by Mr. Justice Matthews in Yick Wo vs. Hopkins, 118 U. S. page 356:

> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

If either of the objections just stated is well taken, the act under consideration is void in its entirety.

Other essential provisions of the act remove it from the legitimate scope of the police power. Since that power has not been—and perhaps may not be—brought within the precise boundaries of a conceptual definition, it is but natural that respecting its application questions may arise which evoke difference of opinion among intelligent and impartial men. The number of such questions is increased in the present case by the obscurities of the act. But we do not conceive that to maintain our present proposition we need enter into any field of doubt respecting either the meaning of the statute or the scope of the power.

It is now settled that the exercise of the police power must always be in subordination to the provisions of the Fourteenth Amendment. (Atchison Topeka & Sante Fe Ry. Co. v. Vesburg, 238 U. S., 56.)

While in the sanctioned exercise of that power it will frequently operate to place reasonable restrictions upon the right of contract, it may not be so exercised as to place unreasonable restrictions upon that right. In that respect this act offends seriously in its general scope. **Indeed, its proclaimed virtue is a vice.** That virtue is that while in form it conditions and under circumstances which are likely to arise, it prohibits sales and, it at the same time necessarily prevents purchases, and thereby shields contemplating purchasers from loss of property by the exercise of their own defective judgment. For, it is to be borne in mind that the terms of the act operate upon honest sales as well as those which are fraudulent. In all transactions within its purview it places the citizens of the state under guardianship and deprives them of dominion over their property which is an essential element of its ownership. Have we not known throughout our professional lives, and did not generations of lawyers before us know, that to deprive an adult persons of such dominion over his own property as will not injuriously, in a legal sense, affect others, requires process of law? So imbedded in the convictions of constitutional lawyers is this view that it is somewhat surprising to find that it was once challenged in court. That was in the case of Smith vs. Burlingame, 4 Mason, 121, where Mr. Justice Story vindicated the common conception of constitutional lawyers in an opinion which was as elaborate as the question required. His opinion was:

> "**The courts of Probate** have no right to put a person under guardianship, as unfit to manage her af-

> fairs, without notice to the party, and an adjudication of the facts, and until such adjudication no letters of guardianship can legally be issued. The case of Chase vs. Hathaway is directly in point and with that case I entirely concur."

In this respect it seems to be sufficient to say of the act that without process of law it reduces citizens to the status of persons who have been adjudged to be non compotes. Process of law requires that not only shall judicial power be exercised after a hearing to reduce an adult person to that status, but the same power and the discretion which it employs must be exercised in choosing a guardian or trustee of the particular property in question. Since this act operates upon all the persons and property within its purview, providing for a no more capable guardian or trustee than a petty administrative officer for the wide diversity of property within the scope of the act, it seems obvious that the good which it may accomplish must be secured at too high a price, the chief element of which would be the denial of the guaranteed rights of liberty and the control of property.

Though the legitimate exercise of the police power may sometimes impose reasonable restrictions upon the right of contract, **it can never be so exercised as to deny to any citizen the equal protection of the laws.** The offences of the act in this respect are so numerous that it will hardly be necessary to call attention even to all of those which result from the clear provisions of the act. Some of them are:

(a) The discriminating requirement of paragraph "f" of subsection 3 of Section 6373-2, where one is made subject to the requirement of a license because he offers

securities a part of whose proceeds may be used "**directly or indirectly in payment for patents, services and good will and for property not located in this state.**"

It seems entirely clear that the owners of such property are not to be prejudiced because of its character. The law of the land gives to an inventor an unqualified right of property in his invention. We are aware that it has been held by the courts of last resort in several of the states, including Ohio, that the legislature may require that a note given for a patent right shall bear a statement of that fact upon its face. It has also been held that before one sells a patent right he may be required to file within the jurisdiction of the proposed sale a certified copy of the letters patent and evidence of authority to make the sale. These conclusions have been approved by this court in Allen vs. Riley, 203 U. S. 347, and in the case of Ozan Lumber Company vs. Union County National Bank of Liberty, 207 U. S. 251. We accept these decisions as conclusive upon the questions involved notwithstanding the weighty reasons for dissent in those cases and for decisions to the contrary upon the same subject. These reasons, however, should serve to prevent an extension of the view therein taken to other cases. These statutes were upheld as reasonable regulations of sales, not substantially interfering with their accomplishment. That palliation is not found in the provisions of this act, for, **in the exercise of his discretion the commissioner may prohibit the sale of the securities whose proceeds are to be used wholly or partly in the purchase of such property**. It was recognized in those cases that provisions substantially obstructing the sale would render that act void, as was held, and a violation of the act of congress upon the subject.

OTHER DISCRIMINATIONS VIOLATIVE OF FOURTEENTH AMENDMENT.

That a discrimination should be made on account of the contemplated use of the proceeds in paying for services, good-will, or for land not located in Ohio is contrary to the universal conception of lawyers and business men and to all of the decisions of which we have any knowledge.

(b) Similarly objectionable is the discrimination in paragraph "a" of the same section against an owner who disposes of securities "in the course of repeated and successive transactions of a similar character." All of these transactions are essentially private and in no way affected by a public interest. This statute recognizes that they are so as to a single transaction. That which is without reason is arbitrary. There is no reason to say that transactions change their character by increasing their numbers.

(c) Obviously offensive in this respect is the discrimination in paragraph "f" of Section 6373-9 in favor "of a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted place of business in this state regularly open for patronage as such."

This distorted feature of the act perhaps suggests its extra-legislative conception.

(d) Paragraph "d" of Section 6373-9 operates to the prejudice of an owner of securities of a taxing subdivision of another state, territory, province or foreign government.

(e) Paragraph "b" of Section 6373-10 operates to the prejudice of the owners of securities which have not been published from time to time for at least six months in the columns of a daily newspaper.

(f) **Paragraph "c" of Section 6373-10 operates to the prejudice of those engaged in a transaction where the disposal is for less than five thousand dollars.**

(g) Like discrimination appears in subsection 1 of Section 6373-2 where the transaction includes less than fifty per cent. of the amount of the total issue, a provision founded upon no reason and clearly to the prejudice of small dealers and purchasers.

The act is printed in the brief of our adversaries. To further present the reasons for urging its invalidity resort must be had to the detailed provisions of the act, and we present the following condensed summary showing most of those which we think are fatal to its validity.

I. It requies that one who is about to exercise the constitutionally guaranteed right to make contracts and exercise dominion over his property shall be required, at expense, labor and delay, to seek additional authority.

II. It assumes to condition the right to transact ordinary business upon the reputation of the applicant and confers upon the commissioner arbitrary power to determine what that reputation is without a hearing and without legislative standards.

III. It imposes a license fee of fifty dollars per annum and five dollars additional for each agent that one may employ, and makes the impracticable requirement that the names and addresses of all such agents shall be given in advance.

IV. It confers arbitrary power upon the commissioner to regulate the transactions of one who has obtained a

license and makes discriminations and arbitrary qualifications which are forbidden. Prominent among such discriminations are between the cases where more or less than fifty per cent of an issue of bonds is included in the sale to one person; between securities which have and which have not been authorized by the public service commission of this state; between the securities issued by a bank, trust company, a building and loan association organized under the laws of this state and those which are not; between an owner who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company who sells at a commission of not more than two per cent. and one which sells at a higher commission; against securities when any part of the proceeds to be derived from the sale are to be applied in payment for patents, services, good will or for property not located in this state; in providing for such delays in the issuance of a license and in the subsequent conduct of business thereunder as to substantially hinder, and in many cases naturally arising, to utterly prevent sales; in discriminating between securities which have and which have not been published in regular market reports; between sales where in a single transaction the sale is for five thousand dollars or more; in discriminations against securities issued by taxing subdivisions of other states; between securities upon which there has and has not been a default as to principal or interest; against securities which have not from time to time for six months been published in the regular market reports of the news columns of a daily newspaper of general circulation in the state; where the se-

curities are or are not of manufacturing or transportation companies in the hands of bona fide purchasers prior to March 1st, 1914, where such companies were, on that date and shall be at the time of the proposed sale, going concerns; between cases where the information contemplated is or is not contained in a standard manual of information approved by the commissioner; where the disposal is or is not made for a commission of less than one per cent. of the par value thereof by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted business in this state regularly open for public patronage as such; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid ninety per cent. of the price at which they are to be sold by him; where the securities are or are not those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which such securities are predicated are located within this state.

Section 6373-16 assumes to authorize the commissioner before and after issuing a certificate to a licensee to conduct a particular transaction to make such examination as he may deem advisable, such examination to occupy as much time as the commissioner may deem advisable, and at his discretion to be wholly at the expense of the licensee, into the property which is the basis of the securities whose sale is contemplated. This is true even though the securities offered may be those of a mining corporation in South Africa and the contemplated sale

may be to one who has the amplest knowledge of the properties and although the delay and expense of the examination may entirely prohibit the transaction.

Pages of the brief for appellant suggest a total misapprehension of oft repeated language of the courts expressive of regard for the primary authority of General Assemblies. Counsel seem to regard it as a rule for raising doubts instead of a rule for resolving serious doubts that may arise out of a case. To show that to raise doubts is not its function, it is only necessary to advert to the fact that no court has ever declared that it affirmed the validity of a statute out of respect for the legislative body which enacted it. On the contrary, in all of the cases in which acts have been held valid after such compliments have been bestowed upon the legislative function, the courts have always proceeded to give legal reasons for their judgment, and it is oft repeated "as being of the essence of constitutional law that an act repugnant to the constitution is void and the courts must so hold." In other words, the invincible logic of Marbury vs. Madison is still recognized.

THIS ACT RAISES OTHER QUESTIONS OF GRAVE IMPORTANCE.

By whom but a judicial tribunal can it be determined "that the law has been complied with," the determination to operate as a predicate to restrict one's use of his property; or that business is or is not "fraudulently conducted?" In the absence of fraud, where may authority be found in any department of the government to determine that securities are offered for sale on "unfair terms?"

If such authority could be found anywhere, would not its exercise be conditional upon a "hearing?" Is a legislative act which provides for such conditions arising frequently in the actual conduct of business as will absolutely prevent sales less offensive than an act which in terms prohibits them? Is not one whom a petty administrative official may deem to be of bad repute still "a person within the jurisdiction" of the state and entitled to the equal protection of the laws?

The authority of the legislature to punish fraud is limited only by the inhibition of cruel and unusual punishment, and its prevention is within the power of the legislature, which may be able to devise an efficient measure to that end which will not interfere with the freedom of normal commerce. The value of that freedom received early recognition. It was the most urgent consideration for the adoption of the constitution. It was known to rest upon the sanctity of contracts. The right to make contracts not inimical to public weal with the right to their judicial enforcement is doubtless of more value to the people of the land than all of its taxable property. Indeed, the value of taxable property depends chiefly upon the owner's right to contract with respect to its use and usufruct. So important was this right in the appreciation of those who feared its invasion by Congress that the due process clause was placed in the fifth amendment. The serene confidence then reposed in the legislatures of the states abated with experience and observation. We may not know to what extent this was due to observations of the influence of promoters of legislation, itself inimical to the public weal—sometimes to the extent of creating trusts. Comprehensively these causes were embraced in the guarantees of the fourteenth amendment.

RATIONAL RULE.

The freedom of commerce has been the object of enduring solicitude. Its security has been greatly enhanced by reason of the beneficient decisions of this court establishing a rational rule for the condemnation of contracts void by the tests of the comomn law, and saving the normal contracts of commerce. This is done by tests which business men and their advisers find comparatively easy and certain of application. Is it not pertinent to inquire: Could any one formulate what he would himself regard as a rule of reason whch would conduct to the conclusion that this court should in one of its adjudications affirm the judgment of an inferior court imposing penalties which the anti-trust laws prescribe for the punishment of citizens who enter into engagements to place restrictions upon the freedom of commerce, and in another to affirm the validity of legislation which places like restrictions on the freedom of commerce? Do not the provisions of this act suggest the evil effects of trusts so established as to be beyond the reach of courts except by the firm maintenance of these constitutional safeguards?

PERTINENT CITATIONS PRELIMINARY TO THE DISCUSSION OF THE COMMERCE CLAUSE OF THE CONSTITUTION.

We think it appropriate in a preliminary way to cite the observation of Mr. Justice Strong in the case of The Hannibal & St. Joseph Railroad Company vs. John F. Husen, 95 U. S. 465. It is applicable to the Ohio blue sky law in all of its interstate commerce phases:

> "The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

We likewise in a preliminary way think it equally appropriate to quote the language of Mr. Justice Field in the case of Welton vs. Missouri, 91 U. S. 275, as especially applicable to the provisions of the Ohio statute, which discriminate against the securities of taxing subdivisions of other states, territories, provinces and foreign governments, and to the stocks and obligations of banks, trust companies, building and loan associations organized under the laws of other states and other features of the act discriminatory against citizens of other states:

> "Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the federal govern-

ment over a commodity has ceased, and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect and is, therefore, in our judgment, unconstitutional and void."

THE BLUE SKY LAW OF OHIO CONTRAVENES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The opinion of Judge Sater so clearly discloses that the Ohio blue sky law contravenes the commerce clause of the federal constitution that we feel that the discussion of the question in this brief should be as short as due regard for the presentation of opposing notions by counsel for the appellant will permit. A long course of reasoning is indulged in by opposite counsel in their brief, and an attempt made to show that the principles underlying the Ohio blue sky law leave it within the control of the cases of Nathan vs. Louisiana, 8 Howard, page 73, and Paul vs. Virginia, 8 Wallace, 168, and not as found by the District Court within the cases of the International Textbook Company vs. Pigg, 217 U. S., 91, and the Buck Stove & Range Company vs. Vickers, 226 U. S. 205, 213-216, and the Lottery Cases, 188 U. S., 321. An attempt is made by counsel to show that the District Court of Michigan, in the case of Alabama & N. O. Transportation Company vs. Doyle, 210 Fed. Rep., 173, as a predicate for its conclusion held that the Supreme Court of the United States in the lottery cases overruled the doctrines ob-

taining in the cases of Nathan vs. Louisana and Paul vs. Virginia. This assumption is entirely without foundation. The Federal Court in the Michigan case state in this connection:

> "However, if either of these cases might otherwise be thought now controlling, we think the opinion in the lottery cases requires the contrary result."

This is far afield from saying that the cases of Nathan v. Louisiana and Paul v. Virginia were overruled. We make no claim that these cases have been overruled or modified, but, on the contrary, assert that their doctrines have been repeatedly upheld by this court. However, as stated by Chief Justice Waite, infra, Paul v. Virginia is not controlling in the case of a corporation engaged in interstate commerce. A fair conclusion with reference to the Michigan opinion in that connection is that the Michigan case came within the principle of the lottery cases.

So illuminating is the opinion of Judge Sanborn in the case of Butler Bros. Shoe Company vs. U. S. Rubber Company, 156 Fed. Rep. page 1, that we quote from it at some length:

> "In Pennsylvania Telegraph Company vs. Western Union Telegraph Company, 196 U. S. 1, 8, the state of Florida had granted to the Pensacola Telegraph Company the exclusive right to establish and maintain lines of electric telegraph in certain counties of the state, and the Western Union Telegraph Company, a foreign corporation, sought to erect a line of telegraph therein. Chief Justice Waite opened the opinion of the court in that case in these words:
>
> 'Congress has power to regulate commerce with foreign nations and among the several states and to establish post offices and post roads. The constitu-

tion of the U. S. and the laws made in pursuance thereof are the supreme law of the land. The law of congress made in pursuance of the constitution suspends and overrides all state statutes with which it is in conflict. Since the case of Gibbons vs. Ogden, 9 Wheaton, 1, it has never been doubted that **commercial intercourse** is the element of commerce which comes wthin the regulating power of congress', and he announced the unanimous opinion of the court that the grant of exclusive right of the state of Florida to the Pensacola Company, and its attempts thereby to exclude the corporations from certain portions of the state were futile."

Of the case of Paul v. Virginia, he said:

> "We are aware that in Paul vs. Virginia, 8 Wall., 168, this court decided that a state might exclude the corporation of another state from its jurisdiction, and that corporations are not within the clause of the constitution which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens of several states.' Art. IV, Section 2. This was not, however, the case of a corporation engaged in interstate commerce; and nothing was said by the court to show that; if it had been very different questions would have been presented."

We feel sure that this is the consideration which the District Court of Michigan have in mind. From this it is apparent that in any matters of interstate commerce a state may not interfere from any angle. It matters not whether the corporation be foreign or domestic.

That there are other elements in commerce than transportation appears clear from what is said by the court in the case of Lyng v. Michigan, 135 U. S., 161, as follows:

> "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the

receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to congress. Leloup v. Mobile, 127 U. S. 640, 648 (32:311, 314), and cases cited. In Bowman v. Chicago N. & W. R. Co., 125 U. S. 465 (31; 700), it was decided that a section of the code of the state of Iowa forbidding common carriers to bring intoxicating liquors into the state from any other state or territory, without first being furnished with a certificate as prescribed, was essentially a regulation of commerce among the states, and not being sanctioned by the authority, express or implied, of congress, was invalid because repugnant to the constitution of the United States; and in Leisy v. Hardin (ante, p. 128), the judgment in which has just been announced, that the right of importation of ardent spirits, distilled liquors, ale and beer from one state into another, includes, by necessary implication, the right of sale in the original packages at the place where the importation terminates; and that the power cannot be conceded to a state to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, without congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any state, applies to all commodities in which a right of traffic exists, recognized by the laws of congress, the decisions of courts, and the usages of the commercial world. It devolves on congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances. Lyng was merely the representative of the importers, and his conviction cannot be sustained, in view of the conclusions at which we have arrived."

DISCUSSION OF CASE OF NATHAN VS. LOUISIANA.

Indeed the case of Nathan vs. Louisiana, 8 How. 7[illegible], is an authority for the appellees, the court saying:

> "Foreign bills of exchange are instruments of commerce, it is true."

It may be said here that it is so obvious that stocks, bonds and commercial paper are articles of commerce as that nothing further in support thereof need be said. The only question, then, is: Does the Ohio blue sky law in its operation interfere w[illegible] he use of these articles of commerce in interstate [illegible]? It will be kept in mind that the Louisiana [illegible] the case of Nathan vs. Louisiana, was a t[illegible] Ohio blue sky law is not a tax law, nor is [illegible] inspection law; its dominant characteristics are promoitory. In the Nathan case, Mr. Justice McLean says:

> "The right of a state to tax its own citizens for the prosecution of any particular business or profession within the state has not been doubted. We find that in every state money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property, not exempted by law are taxed. As an exchange broker, the defendant had a right to deal in every description of paper and in every kind of money; but it seems his business was limited to foreidgn bills of exchange. Money is admitted to be an instrument of commerce and so is a bill of exchange, and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instrument of commerce."

He would be a bold man indeed who would now assert that the national right was infringed upon by the passage of a law similar to the Louisiana one. The courts will not deny to a state, unless absolutely necessary to preserve intact the federal constitution, the right to maintain its best interests as subserved through the necessary medium of taxation.

> "The power of taxation is indispensable to their (states') existence and is a power which, in its own nature, is capable of residing in and being exercised by, different authorities at the same time * * * there is no analogy then between the power of taxation and the power of regulating commerce."
>
> Gibbons v. Ogden, 9 Wheaton, 1.

The Louisiana statute was a tax upon a business.

PAUL VS. VIRGINIA BRIEFLY DISCUSSED.

The essence of Paul vs. Virginia, 8 Wallace, 168, is that the right of a foreifn insurance company to do business in a state is subject to license, and that a state in imposing conditions upon a foreign insurance company before it may receive such license is not contravening the commerce clause of the constitution of the United States, and the court there held that an insurance policy was merely a personal contract, and that issuing a policy of insurance is not a transaction of commerce. Mr. Justice Field in that case said:

> "They (insurance policies) are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale. They are like other personal contracts between parties which are completed by

their signature and the transfer of a consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states."

This doctrine has been affirmed in a number of cases. We refer in this connection only to the case of New York Life Insurance Company vs. Deer Lodge County, 231 U. S. 495, where the sourt say:

> "The decision of the cases is that contracts of insurance are not commerce at all, neither state or interstate. This is the answer to the contention of the insurance company. The company realizes it to be an obstacle and has attempted to remove it by detailing the manner of conducting its business as demonstrating that its policies are interestate contracts. We have replied to the attempt and shown that its manner of business has no such effect. It follows, necessarily, therefore, that neither the lottery case nor the Pigg case impugns the authority or the application of the cited cases. They, the Lottery case and the Pigg case, were concerned with transactions which involved the transportation of **property** and were not mere personal contracts."

Quoting further:

> "Commerce was defined, quoting Mr. Justice Field, Mobile county vs. Kimball, 102 U. S. 691, 702, to "consist in intercourse and traffic, including in these terms navigation and transporation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

It suggests itself as a matter of common sense that the subject of insurance is properly a matter of state regulation. Insurance is a community matter. Fire becomes a community matter whether the citizens be **nolens** or **volens**. Indeed an honest man needs fire insurance irrespective of his own acts. His losses usually come to him

through the acts of those over whom he has no control. The tossing of a match into a waste basket or the explosion of a gasoline tank may affect the financial interests of a whole city, so that looked at from either of two angles, the one that an insurance policy is a mere personal contract and not a subject of traffic, barter, or sale, and the other that the entire public are interested in insurance and must for their safety insure, the holding that the insurance business is subject to state regulation is far from giving support to the claim that the state has the right to regulate the sale of stocks, bonds and other securities.

DOES THE CASE AT BAR COME WITHIN THE PRINCIPLES OF THE CASES OF NATHAN VS. LOUISIANA AND PAUL VS. VIRGINIA OR DOES IT COME WITHIN THE PRINCIPLES OF THE LOTTERY CASES AND THE CASE OF INTERNATIONAL TEXTBOOK COMPANY VS. PIGG AND BUCK STOVE AND RANGE COMPANY VS. VICKERS?

The District Court held that it came within the latter set of cases. Was the District Court right? Counsel for appellant in their brief, page 81, say:

> "The business of the Geiger-Jones Company so far as affected by the Blue sky law is intra-state. There is not disclosed in their bill any question of transportation."

Let us see what is in the petition in the Geiger-Jones case bringing it under the head of the commerce clause of the constitution. The petition alleges:

> "That the general nature of the business in which said corporation is engaged, and in which it is au-

> thorized to engage, as appears from its articles of incorporation, is that of buying and selling investment securities, its business consisting principally of buying and selling the stocks and bonds of industrial corporations; that as a corporation it has been since the year 1907 actively engaged in the marketing of the kinds of securities aforementioned with the result that it has sold and there is now standing in the hands of persons to whom it has sold securities amounting to twenty to twenty-five million dollars par value. * * * * that said Geiger-Jones Company has a regular established clientage of approximately eleven thousand persoas residing in the state of Ohio **and other states**; that the stockholders in the plaintiff company consist of several hundred persons residing in the state of Ohio **and in other states**; that the securities above referred to as having been sold and disposed of by plaintiff consist of the securities of over twenty corporations organized and existing under and by virtue of the laws of Ohio **and other states and foreign countries**; that not one of the eleven thousand clients to whom the plaintiff has sold the securities above referred to has ever suffered or incurred any loss because of his investments in said securities; that the plaintiff in the course of its business has marketed and is now marketing the securities of Ohio corporations and citizens in other state of the United States and in foreign countries; that it has sold and is now selling **the securities of citizens and corporations of other states and foreign states in the state of Ohio and in other states**; and that said plaintiff is and has been engaged in intra-state, interstate and foreign commerce."

No pleading of any kind was filed by the appellant in the District Court, and the allegations herein made stand as admitted as true. Assuming that the instruments referred to are articles of commerce, it seems clear to us that the allegations of the petition bring the plaintiff clearly within the protection of the commerce clause of

the Constitution of the United States. Little wonder that Judge Sater in his opinion on this branch of the case said:

> "If the act be unconstitutional, each of the plaintiffs is, as he must be, within the class whose constitutional rights are invaded."

However, we shall give some attention to the statement of plaintiff's counsel that "there is not disclosed in their bill any question of transportation." There is much discussion in appellant's brief upon the proposition that the Lottery cases dealt with the **transportation** of lottery tickets. The answer to counsel's contention is that transportation is but an element of interstate commerce.

Counsel lose sight of the legal fact that sale is an essential ingredient of commerce. Mr. Justice Story, in "Story on the Constitution," Section 1072, says:

> "Commerce is intercourse; and one of its most essential ingredients is traffic. It is inconceivable that the power to authorize traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuation is indispensable to its value. To what purpose should be the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation and it is an essential ingredient of that intercourse of which importation constitutes a part, as congress have the right to authorize importation they must have the right to authorize the importer to sell. What would be the answer if a foreign government should be informed that its merchants after importation, were forbidden to sell the merchandise imported?"

This is the doctrine appearing in the case of Lyng vs. Michigan, supra.

Assuming that stocks and bonds are articles of commerce, if a citizen of Pennsylvania by mail ordered the

transportation to him of a number of bonds to be sent from Canton, Ohio, the place of business of the Geiger-Jones Company, the sale, one of the ingredients of interstate commerce, would be effected at Canton. We assume that it would not be denied that if a quantity of groceries were ordered shipped from Canton to some point in Pennsylvania and were shipped, the transaction would be a transaction under interstate commerce. The two are identical if bonds and stocks be articles of commerce. Let us see where the blue sky law would interfere.

The very first section, 6373-1, provides:

> "Except as otherwise provided by this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates, or other similar instruments evidencing title to or interest in property issued or exercised by any private or quasi public corporation, co-partnership, or association or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do, as hereinafter provided."

It appears that the very first element involved in interstate commerce is prohibited without permission from the state. It is difficult to answer an argument resting upon no foundation. We see no parallel between the case at bar and the cases of Nathan vs. Louisiana or Paul vs. Virginia, and the District Court evidently did not think it worth while after mature consideration of the learned opinions of the judges in passing upon the other blue sky cases, to make reference to the cases so confidently relied upon by appellant's counsel. It appears from the petition of the Geiger-Jones Company that "it has sold and is now selling the securities of citizens and corporations of other states and foreign states in the state of

Ohio and in other states." It requires no stretch of imagination to conclude that a company at Canton, Ohio, which sells the securities of citizens and of corporations of other states and foreign states must import such securities. If the company be prohibited, as it is, from selling such securities, in the first instance as a dealer, it is in substance prohibited from importing them. Stocks and bonds are not articles of consumption. The object of importation in each and every instance is sale so far as a dealer is concerned. The act itself, therefore, prohibits an Ohio dealer from trafficking in articles of interstate commerce so long as the sale is to be effected in Ohio.

The district courts in the two Michigan cases, in the Iowa case, in the West Virginia case, and in this case, held without hesitation that dealers in stocks and bonds who sold to citizens of different states, making use of the usual instruments of traffic, such as the mails, the telegraph and the telephone, were engaged in interstate commerce. The only dissent in any of the cases where the full court sat is that of Judge Wood in the West Virginia case.

With respect to the dissenting opinion of Judge Wood it is sufficient to say that it is not predicated upon any view which he took respecting any constitutional question here involved. It was based wholly upon his peculiar interpretation of the West Virginia statute, and that interpretation plainly could not be made with reference to the Ohio act.

THE HOLDING IN THE CASE OF THE BUCK STOVE & RANGE COMPANY VS. VICKERS, 229 U. S. 205.

The district court in Ohio followed the principles laid down in the case of The Buck Stove & Range Company vs. Vickers, 229 U. S. 205. Mr. Justice VanDevanter in the opinion in that case said:

> "As accurately reflecting what was held in the Pigg case we excerpt the following from the opinion of the court delivered by Mr. Justice Harlan (pages 109-112):
>
> "That to carry on interstate commerce is not a franchise or privilege granted by the state; it is the right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the case of mere corporate facilities as to the matter of convenience in carrying on their business, cannot have the effect of depriving them of such right unless congress should see fit to interpose some contrary regulation on the subject. How far a corporation of one state is entitled to claim in any state where it is doing business, equality of treatment with individual citizens in respect to the right to sue and defend in the courts is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the statement mentioned in 1283 (1358 General Statutes—1905) of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is the violation of its constitutional rights. It is the established doctrine of this court that a state may not in any form or under any guise burden the prosecution of interstate business, but such a burden is imposed when a corporation of another state, lawfully engaged in interstate business is required, as a condition of its right to prosecute its business in

Kansas to make and file a statement setting forth certain facts which the state confessedly could not control by legislation. It results that the provision as to the statement mentioned in 1283 (1358 General Statutes—1905) must fall before the constitution of the United States, and with its established rules and statutory constructions must follow that part of the same section which provides that the obtaining of the certificate of the secretary of state that such statement has been properly made, shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas."

Counsel for appellant in their brief at page 106 say:

"In this same connection it is to be observed that the International Textbook Company vs. Pigg case, relied upon by some of the courts in perhaps a little different connection, does not militate against the theory above outlined; for the business transacted by the International Textbook Company in the state of Kansas as shown by the record of that case, involved the making of contracts in that state, calling for the **delivery there** from a point in Pennsylvania of tangible property, viz., books, which are in every sense commodities."

We fail to see any distinction. The Geiger-Jones Company may accept at Canton, Ohio, a letter containing an offer from a firm in another state of stocks and bonds, and the principle would be exactly similar to the transaction in the case of the International Textbook Company vs. Pigg. We do not understand that the shipment has to be one of tangible property. Interstate commerce is certainly not limited to tangible property, nor even to commodities. Webster in his definition of commodities excepts animals, and we assume that appellant's counsel would not make the claim that animals are not subjects of interstate commerce, merely because not included in

the term "commodities." The answer to all of the contention of appellant's counsel under this head is found in Judge Sater's opinion, from which we quote:

> "Because a certificate of stock is only evidence of the ownership of shares, the interest represented by them being held by the company for the benefit of the true owner (Citizens Sav. & Tr. Co. v. Ill. Cent. R. R. 205 U. S. 46, 57; Bank v. Mfg. Co. 67 Ohio St. 306, 314), it does not follow, as defendants' counsel contend, that such certificate is of less value than an unprinted sheet of paper of corresponding size and quality, and that it cannot therefore be a subject of interstate commerce. If it be but written evidence of an interest in corporate property, the same may be said of notes and bills, which are mere evidence of indebtedness on the part of individuals or corporations that issue them. In Merritt v. American Steel-Bars Co., 79 Fed. Rep. 228, 235, C. C. A. 8, in speaking of stock certificates, it was said that:
>
> "In the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."
>
> In Ohio a stock certificate is so far property that it may be seized by an officer making an attachment or levy. Sec. 8673-13 G. C."

POWER OF CONGRESS OVER INTERSTATE COMMERCE—WHEN EXCLUSIVE.

We concede that this court has recognized the clear distinction between those cases in which state regulations are admissible and those in which they are not. Whatever subjects of commerce are in their nature national, or admit of one uniform system or plan of regu-

lation, are to be regarded as under the exclusive control of Congress; other subjects, which are to be regulated in view of local circumstances and facts, and which can usually be best regulated by the state are subject to such regulation so far as it does not interfere with any action of congress. In this category belong regulation of pilots, construction of bridges over navigable waters, etc. This doctrine appears clear from a consideration of the following cases:

Crandall v. Nevada, 6 Wall., 42;
Steamship v. Portwardens, Id. 31;
Ex parte v. McNeil, 13 Wall., 236.

This doctrine is expressly declared in the case of Sabine Robbins vs. Taxing District of Shelby County, Tenn., 120 U. S., 489. The first two propositions of the syllabus are as follows:

"1. The power of congress to regulate interstate commerce is exclusive when its subjects are national in character or admit only of one uniform system or plan of regulation.

2. Where its power is exclusive, the failure of congress to make express regulations indicates its will that the subject shall be left free from restrictions or imposition."

Pertinent, also, to this question is the following:

"Where a subject of interstate commerce is national in character or admits of only one uniform system of regulation, the power of congress is exclusive; and its failure to make express regulations indicates its will that the subject shall be free."

Philadelphia Southern Mail Steamship C. v. Commonwealth of Pennsylvania, 122 U. S., 326.

Also

"A state cannot constitutionally impose upon a steamship company incorporated under its own laws

a tax upon its gross receipts derived from transportation of passengers by sea between states and to and from different countries."

Ibid.

"Neither a state nor its officials by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against interstate commerce or the right to carry it on."

Haskell vs. Cowham, 109 CCA, 235.

"Neither a state nor its officials by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce in any sound article thereof."

Ibid.

Sanborn, Judge, in his opinion in that case, says:

"These contentions disregard the fundamental grant of the people to the nation of the power to regulate commerce among the states, and they are all answered by these simple and indisputable principles of law. No state by the exercise of, or by the refusal to exercise any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof."

Henderson v. Mayor of N. Y. 92 U. S. 259, 271-272;
Railroad Co. v. Husen, 95 U. S., 465, 471, 473;
Bowman v. Chicago, etc. R. R. Co., 125 U. S., 465, 474, 475, 479, 480-481, 484, 485, 488-489, 497, 507-508;
Mugler v. Kansas, 123 U. S., 623-624.

"No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

Pullman Co. v. State of Kansas, 216, U. S. 56, 65;
Darnell & Co. v. Memphis, 208 U. S. 113, 120-124;
Minnesota v. Barber, 136 U. S. 313.
Brehmer v. Redman, 138 U. S. 78.
Voight v. Wright, 141 U. S. 62.

Judge Sanborn in this same case further says:

"The power to regulate commerce among the states is carved out of the general sovereign power when the national government was formed and granted by the people by means of the constitution to the congress of the U. S. Art. I, Sec. 8. That grant is exclusive. The nation may exercise the power thus given to its utmost extent, and no state may lawfully restrict or infringe this grant or the plenary exertion of its powers, for they are paramount to all the powers of the state and they inhere in the supreme law of the land.

"Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject national in its character and susceptible of regulation by uniform rules. The silence or inaction of congress relative to such subject is a conclusive indication that it intends that interstate commerce therein shall be free, and any law or act of a state or of its officials which prohibits it or substantially restrains its freedom, is violative of the constitution and void."

Welton v. State of Mo., 91 U. S. 275-282;
Brown v. Houston, 114 U. S. 622;
Walling v. Mich., 116 U. S., 446;
Case of the state Freight Tax, 15 Wall. 232.

"Interstate commerce in sound and well recognized articles of commerce must be free, and any prohibition, obstruction, or burden of it by a state statute, is unconstitutional. Such commerce may not be regulated by state at all. The exclusive power to regulate commerce among the states is vested in the Congress."

156 Federal, page 1.

"The inaction of congress in prescribing rules to govern interstate commerce, is equivalent to its declaration that such commerce shall be free from any restrictions."

Welton v. Mo., 91 U. S. 275-282.

Justice Field in the opinion delivered in that case, said:

"It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question.

"It was regulated," says Chief Justice Marshall, in delivering the opinion in Brown v. Maryland.

"By foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. Brown v. Maryland, supra."

"The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection,

and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in congress may be entirely defeated. If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states."

Every word of what is said by Justice Field is applicable to the case at bar. A consideration of the blue sky cases discloses the ingenuity of counsel to distinguish the statute they are defending from other blue sky statutes. The attorneys general of the different states at the same time are co-operating with each other in the hope of evolving some uniformity of legislation. How may we have this uniformity of legislation? Only by the act of congress. The attorney general of Ohio invites the attention of this court to his claim that the Ohio law was changed to meet the decision of the U. S. Court (Record page 47).

Various records of the blue sky cases now before this court afford the most abundant proof of the necessity for uniformity of legislation if any legislation be desired at all, upon the subject of the regulation of the sale of stocks and bonds.

THE OHIO ACT MOST OBNOXIOUS AND MOST BURDENSOME TO INTERSTATE COMMERCE.

We shall not burden the court with a reproduction of all the provisions of the Ohio statute violative of the commerce clause of the federal constitution. That subject is lucidly and forcibly referred to in the opinion of Judge Sater. It may be said in a few words that under the provisions of the Ohio act interstate commerce in respect to the articles covered by the Ohio act is prohibited entirely except under permission granted by the state. So burdensome is the Ohio act upon interstate commerce in this respect that interstate commerce business may not be transacted at all in regard to stocks and bonds without a permit from a state official, and these permits do not issue as a matter of fact, but upon consideration of the superintendent of banks and banking of the applicant's repute for business. If the "commissioner" ascertain (and this may be in any way he sees fit) that the licensee is of bad repute for business, his license may be revoked and his business discontinued. If the licensee has violated any provision of the act his license may be discontinued. It matters not how minor this violation be. If the "commissioner" ascertain that the licensee has engaged, or is about to engage in illegitimate business or any fraudulent transactions, his license may be revoked. The "commissioner" is thus clothed with the

power of "ascertaining" what business is legitimate and what is illegitimate, a question that at times is exceedingly troublesome for the courts.

It was with great warrant that Judge Sater in his opinion said:

> "The draughtsman of the act here in question, unwittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above named cases, and added others equally, if not more, obnoxious. The burdens which it imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable. The enforced suspension from all business activity for a period of thirty days, imposed by the original Michigan act, was held to be a fatal "30-day paralysis." In the later decision rendered by the same court (Halsey & Co. v. Merrick) the subsequent act of that state was over-thrown, notwithstanding the absence of such restrictive provision. In the present act the prohibition from the transaction of business must extend for a week, and possibly twenty or thirty days, or more; it therefore offends against the constitution quite as much as the first of the Michigan acts."

THE STATE NOT WITHIN THE LEGITIMATE EXERCISE OF ITS POLICE POWERS IN ENACTING THE BLUE SKY LAW.

It is conceded that if the subject matter is within the police power of the state, which is denied strenuously, the state in the exercise of that power could affect interstate commerce incidentally, and this would be the limit of the state's power. The business of dealing in stocks and

bonds, the normal contracts of commerce, is predominantely private and therefore of course not subject to the police power of the state in any instance.

The question before us now under the head of "Interstate Commerce" is, has the state of Ohio the right to prevent an Ohio corporation from selling its private property to a citizen of another state? A contract of sale at Canton, Ohio, of stocks and bonds to be transported to a citizen of another state is a transaction of interstate commerce. Interstate commerce involves, as before stated, more elements than mere transportation. It involves the right to buy and sell at either terminus:

> "All sales of sound articles of commerce which necessitate the transportation of the goods sold from one state to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test of interstate commerce; and every regulation contract, trade and dealing between the different states, which contemplates and gives such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."
>
> Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 17.

Counsel for appellant fall into the fundamental error of assuming that transportation is the whole of interstate commerce.

> "The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general and includes alike commerce of individuals, partnerships, associations, and corporations."
>
> Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 17, 8 Wallace, 82, 183

The court in Adams Express Company vs. New York, 232 U. S. 14, citing Crutcher vs. Kentucky, 141 U. S. 47, say:

> "A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The court further observes in the same case:

> "While the exercise of the police power essential for the protection of the community may extend incidentally to operations of interstate commerce, the police power does not justify the imposition of direct burdens on that commerce nor its subjection to unreasonable regulations."

It appears, therefore, immaterial what the instrumentalities of interstate commerce may be. The state has no power of regulation or control over it. It is true that the state may regulate its own creatures, but it is not to be presumed that the legislature of Ohio intended to discriminate against a domestic corporation, or permit individuals and partnerships to sell stocks and bonds, and at the same time deny corporations to do likewise.

> "Since the case of Gibbons v. Ogden, 9 Wheat. 1, said Chief Justice Waite, in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S., page 8, 'it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress.' The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado, from other states, and they necessarily constituted transactions of interstate commerce."
>
> Butler Bros. Shoe Co. v. U. S. Rubber Co. 156 Fed. 17

So, necessarily, the contracts of the Geiger-Jones Company entered into at Canton for the transportation of sound articles of commerce to citizens of sister states, were transactions of interstate commerce.

In the case of Haskell v. Cowham, 109 U. S. Cir. Ct. of Appeals, page 235, it appears that the state of Oklahoma, through its officers, sought to prevent, and threatened to continue to prevent, one Cowham from selling his gas under interstate commerce by preventing him from conducting it out of the state. The right to be protected in that case was the right of a private citizen by means of his ownership of gas to transport it for sale. This right was a property right, and was so held by the court. And the right to sell any legitimate article of commerce is a property right. The court held that the state within the exercise of its police power was without the right to prevent the owner of the gas from transporting it out of the state for the purpose of sale.

The court in that case held that the reason for the rule which gives the state the right to prohibit the transportation of the waters of rivers, lakes and ponds does not exist in the case of the prohibition of transportation out of the state of articles owned by private parties. It appears, therefore, obvious that the state has no power to prevent the sale within its borders of a sound article to be shipped to a sister state.

Tested by the principles laid down in the foregoing case, how stands the Ohio blue sky law?

Under it a stock or bond may be worth dollar for dollar in the gold coin of the realm, and yet it may not be sold within the state to be transported out of the state without permission from the superintendent of banks and

banking, and the superintendent of banks and banking may not permit a dealer to handle securities of that kind if, in his judgment, exercised in his own way, such dealer is not of good business repute.

The attorney-general would have the court to believe that it is in accordance with the law of the land to leave to one state officer the right to determine who is of sufficiently good repute to sell sound securities. Moreover, there is a discrimination against the securities of taxing subdivisions of any other state, territory, or province or foreign government. The bonds of a county in Pennsylvania could not be sold in Ohio by an Ohio dealer without permission from the state.

Section 6373-1, Ohio Act.

This is a direct burden upon interstate commerce and a discrimination against the securities of taxing subdivisions of sister states.

> "Interstate commerce is not a matter that is left to the control of the states until further action by congress; nor is the freedom of that commerce from interference by the states confined to laws only; it extends to interference by any ultimate organ.

A direct interference by the state with interstate commerce cannot be justified by the police power."

> Kansas City Southern Railway Co. vs. Kaw Valley Drainage District, 233 U. S. 75.

Mr. Justice Holmes in that case said:

> "The decisions also show that a state cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the states could not be justified in this way. The state can do nothing which

will directly burden or impede the interstate traffic of the company, or impair the usefulness of the facilities for such traffic."

THE STATE MAY NOT IMPOSE A LICENSE CHARGE ON ONE WHO SELLS ARTICLES WHICH HE IMPORTS.

"And as the right to bring goods from other states includes the right to sell them and to solicit sales therefor, as well as to deliver the property sold, the state can not tax the right to sell or deliver or to solicit sales, whether in the form of a license tax or otherwise. It is immaterial that the tax is without discrimination, as between domestic and foreign drummers, as interstate commerce can not be taxed at all."

(Judson on Interstate Commerce, Section 21.)

For the same reasons that it cannot be taxed a license fee may not be imposed.

CORPORATIONS ARE PERSONS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT, AND ARE THEREFORE ENTITLED TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS.

"Corporations, it is true, are not citizens within the meaning of the constitution, providing that citizens of each state shall be entitled to all the privileges and immunities of the citzens of the several states, though they are persons within the meaning of the fourteenth amendment and are therefore entitled to due process of law and the equal protection of the laws.

(Judson on Interstate Commerce, Section 16.)

THE AMENDMENT OF THE CONSTITUTION OF OHIO IS WITHOUT EFFECT IN THIS CASE.

The amendment of the constitution of Ohio relied upon by counsel for appellant is without effect in this case. It adds nothing of materiality to the authority originally reserved to the general assembly with respect to the charters of corporations. We need not concede that the reserved power to amend charters authorizes amendments which would "substantially impair the object of the grant or any rights vested under it." Whatever limitations may have been placed upon Dartmouth College vs,. Woodward, 4 Wheaton, 518, it still serves to protect substantial rights in property, but if we should make the concession, it still remains that the act now under consideration does not purport or assume to exercise such reserved authority. While an act clearly expressing the legislative intent to exercise such reserved power as the legislature may have would be effective though not in the form of an amendment, such intent must appear. In this act there is no suggestion of such intention. It does not purport to distinguish in its purposes between corporations and natural persons, nor domestic and foreign corporations. It assumes to regulate dealings in securities by all dealers within its definition. It should not be said that the legislative power is exercised by pure accident and without any intention whatever. As was said by this court in the case of Chicago, Burlington & Quincy Railroad Company vs. Railroad Commission of Wisconsin, 237 U. S. 220, at page 234:

> "We would be very averse to decide that without explicit declaration every general law of a state ap-

> plicable to corporations was enacted as an amendment to their charters."

Certainly in the present case it does not appear either from its title or its provisions that the legislature intended to pass an act applicable to corporations. If further discussion of the question is desirable it may be found in the opinion of the court below.

AS TO THE APPELLEES, ROSE AND COULTRAP.

After all that has been said upon the subject of corporations it must not be forgotten that the appellee, Rose, is a natural person, a citizen of the state of Ohio, there engaged in his constitutionally guaranteed right of conducting transactions in the normal contracts of commerce including interstate commerce. The appellee, Coultrap, a natural person, and a citizen of Pennsylvania, is engaged in the exercise of the same rights within the state of Ohio, and that right is guaranteed to him by the provision of the fourteenth amendment **"that no state shall abridge the privileges and immunities of citizens of the United States, nor deny to any citizen within its jurisdiction the equal protection of the laws."**

CONCLUSION.

The penitential provision of Section 6373-8 for a resort to the Court of Common Pleas by one whose application for a license has been refused, or whose license has been revoked, is unavailing as repentance without restitution. The power attempted to be exercised by the commissioner is forbidden by the fourteenth amendment, whose terms seem to have escaped the attention of the

legislature: "**No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**" These are direct limitations upon the power of the state and **upon all the departments of its government.** The state has made a law, which, by its manifold provisions transgresses all of them. It is forbidden to enforce it. There is no provision for the exercise of judicial power upon issues joined. The repetition before the Court of Common Pleas of the arbitrary proceedings before the commissioner would afford no remedy to him whose property rights are invaded, however it might affect the public respect for the courts. Even if the rights were to be determined in the exercise of judicial power, due process of law would be required to its validity. Moreover, one resorting to the Common Pleas Court under this section would realize that his "last end is worse than his first" for the act provides that: "the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of."

Can any one find in this act a suggestion of deference to the requirement of the due process of law of constitutional government? By what may the act be distinguished from the administrative process of despotism?

Respectfully submitted,

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The distinction so elaborately pressed in the brief of our adversaries as to differences among legislative, administrative and judicial discretion does not seem to be of any importance in the present controversy, for the interdiction of the Fourteenth Amendment is against the state and all of its departments and officials.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Numerous decisions of this court are condensed in the following paragraph from Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S., 226:

> "It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the Fourteenth Amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U. S., 339, 346, 347, (25: 676, 679); Neal v. Delaware, 103

U. S., 370, (26: 567); Yick Wo v. Hopkins, 118 U. S., 356, (30: 220); Gibson vs. Mississippi, 162 U. S., 579, (40: 1078). These principles were enforced in the recent case of Scott v. McNeal, 154 U. S., 34, (38: 896), in which it was held that the prohibitions of the 14th Amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of the state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th Amendment."

The opinion in which there was dissent from the judgment in that case gives clear approval to this doctrine.

IN THE

Supreme Court of the United States

October Term 1916.

No. 438.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO,

Appellant,

vs.

THE GEIGER-JONES COMPANY,

No. 439.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO,

Appellant.

vs.

DON C. COULTRAP.

No. 440.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO; CYRUS LOCHER, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO, AND WILLIAM T. SMITH, SHERIFF OF CUYAHOGA COUNTY, OHIO,

Appellants,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO MANUFACTURING COMPANY.

ANALYSIS OF THE OHIO BLUE SKY LAW AND CASES REFERRED TO IN CONNECTION WITH THE VARIOUS PROVISIONS CITED BY FRANCIS R. MARVIN, OF COUNSEL FOR APPELLEES.

Analysis of the So-Called "Blue Sky" Law Found in Sections 6373-1 to 6373-24 G. C.

The act in question is entitled, "An act to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sales." Its purpose to interfere with the free and unrestricted sale and exchange of such securities and the private right of contract with respect thereto is glaringly apparent from an examination of the first section thereof, which reads (6373-1):

> "Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, **without being first licensed so to do** as hereinafter provided."

By the terms of Section 6373-2, a "dealer" is deemed to include **any** person or company (except national banks) disposing or offering to dispose of **any** such securities through agents or otherwise, and **any** company engaged in the marketing or flotation of its own securities, either directly or through agents or underwriters, or any stock promotion scheme whatsoever (certain exceptions).

By Section 6373-2, subdivision (f) it is provided that "the term 'company' shall include **any** corporation, co-

partnership or association, incorporated or unincorporated, and whenever and wherever organized.

The above sections taken together then mean simply this, that **no** person, corporation, partnership or association, (in other words, **no** person or combination of persons whatsoever in the state of Ohio) (certain exceptions) can deal in **any** securities (certain exceptions) without being authorized so to do by the "commissioner" and submitting to the restrictions, prohibitions, penalties and delays, provided by the act, and further, that after being licensed, such licensee (so-called) must, before disposing of **any** securities whatsoever, first secure from such commissioner a certificate under the terms of Section 16 of the act and submitting to further restrictions and delays.

In its very purpose, then, to restrict the free transfer, sale, exchange and transmission of such securities, the act itself violates Article I, Section 8 of the United States constitution in that **it imposes an unreasonable and direct burden upon interstate commerce.**

(a) Corporate stocks and bonds constitute articles of interstate commerce.

> Alabama, etc., Transportation Co. vs. Doyle, 210 Fed. 173.
> Compton vs. Allen, 216 Fed. 537.
> Bracey vs. Darst, 218 Fed. 482.

Sales of such securities, as between the states and their transmission from one state to another, whether through the mails or the instrumentality of common carriers, constitute interstate commerce. Sales may be and are affected by telegraph, telephone, correspondence, traveling salesmen and the issuers or investment

companies, directly or through their local or branch houses. The securities may be delivered by such salesmen or branch houses at the time sales are made or subscriptions taken, or by the issuers or investment companies by means of any of the known and usual agencies for transmitting such instruments from one state or another.

(b) **The act in question is not a license, inspection or taxing law, and the business sought to be regulated and controlled thereby is not one affected by a public interest.** On page 178 of the opinion in 210 Fed. 173, the court says:

> "It is well to remember that this act is neither a tax law nor a mere license law. It does not purport to be the former; and while it carries some of the nomenclature and some of the features of the latter, its dominant characteristics and effect are prohibitory. We may therefore disregard the principles and decisions which have sustained, as constitutional, various state tax laws and various state laws which merely licensed the carrying on of some business or occupation."

Again on page 184 of the same case the court says:

> "It is the proposed individual transaction which is the subject of scrutiny. The investment company receives no license in substance nor in form. If it fully complies with the law and the issue and sale of stocks and bonds are approved, and if the next year or the next month it wishes to make another issue which may be substantially similar, it is forbidden to do so until there is another submission and another tacit approval. To call such provisions the licensing of an occupation or business is a misnomer. Engaging in a business is not the thing regulated or permitted."

Again on page 184 the court says:

> "As to dealers, there is more of the form of license. They are required to register and to pay a registration fee and are subject to some general provisions and regulations. For this reason we said above that some parts of the act used the nomenclature of a license law. However, if this is a license to the dealers, it avails them nothing. They cannot do one item of business until that item has passed scrutiny; hence it is clear that the **dominant** purpose is not to license and supervise individuals in the following of an occupation or business, but to regulate **to the point of prohibition,** the business itself."

The attorney general says that the state may lawfully prescribe such burden upon such parties under its police power to enact inspection laws for the purpose of preventing the imposition of fraudulent practices on its citizens. The power to enact the law must be determined from that which is sought thereby to be ordained or accomplished, and not from the title it bears.

The scope of such inspection laws is not without its limitation as applied to the nature of the person, article or thing designed by the law to be inspected, and the manner and method of the inspection to be employed.

In 107 U. S. 159, Mr. Justice Miller says:

> "What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever."

The court in the Iowa case, 216 Fed. 537, after quoting the above language of Mr. Justice Miller, goes on to say:

> "Conceding, therefore, to the fullest extent, the reserve power of the state to provide for the inspection of all such articles and commodities as foodstuffs for man or beast, drugs, medicines, products, compounds, and the like, moving in interstate commerce where inspection thereof is not already provided by national laws, and when, as stated by Mr. Justice Miller, some crucial test is established and may be applied, such as weighing, measuring, analyzing, and the like, it is apparent no such standard or test is or can be established under the act in question, but the test to be applied thereunder must and does rest upon evidence taken, examined, and weighed. It must be held the subjects of interstate commerce therein sought to be regulated and controlled are not only burdened by the act, but are directly burdened thereby, and that such articles are not the subject of state inspection laws. As bearing on this question, see Alabama & N. O. Transp. Co. v. Doyle, supra; International Text Book Co. v. Pigg; 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 84 C. C. A. 167."

On the question as to whether the business of selling stocks and bonds is one affected with a public interest, we desire to call attention to the language on page 179 of the Michigan case (210 Fed).

> "It is enough, now, to remember that the prohibition in question has to do with transactions **predominantly private**. * * * This statute does not deal with common carriers, grain elevators, or other enterprises of that class, nor distinctly with corporations, nor at all with saloons, itinerant ped-

dlers, and the like. The issuing of commercial paper, stocks, or bonds by a private company to get money for its own business no one can suppose is a public or quasi public enterprise; the business of buying and selling stocks and bonds and other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to justify its entire prohibition save under drastic restrictions. We cannot shut our eyes to the fact, which all men know, that, as compared with the total dealings in securities, covered and contingently prohibited by this act, those which may fairly be suspected to be of a fraudulent character are a very trifling proportion; and there is no reason to suppose that the percentage of fraud is any greater than in each of the ordinary business and professional occupations."

PROVISIONS OF THE ACT WHICH DO IMPOSE A DIRECT AN UNREASONABLE BURDEN UPON INTERSTATE COMMERCE.

It is provided in Section 6373-1:

> "Except as otherwise provided in this act, no dealer shall within this state dispose or offer to dispose of any stock * * * **without first being licensed so to do as hereinafter provided.**"

To start with, then, this requiring of a license as a condition precedent to the carrying on of the lawful business of dealing in articles of interstate commerce, is a direct burden on such commerce. This has been held by this court in the case of The International Text Book Co. vs. Pigg, 217 U. S., 91; Buck Stove Co. vs. Vickers, 226 U. S., 205.

Section 6373-3. Before such license shall be issued to any dealer coming within the provisions of the act, such person, firm or corporation desiring to engage in the perfectly **legitimate and lawful business** of selling such securities, must file an application setting forth the information required by Section 6373-3, and if it be a corporation organized **under the laws of another state** it shall, in addition, file a copy of its articles of incorporation, certified by the proper officer of such state, territory or government, and of its regulations and by-laws, and if it be an unincorporated association, a certificate of association or deed of settlement.

Section 6373-4. Notice of such application shall then be published in a daily newspaper. The investigation of the commissioner then begins, and this investigation shall be such "as he may deem necessary," and if he, the commissioner, is satisfied of the good repute in business of such applicant, he then shall, **in not less than one week nor twenty days** after receiving proof of publication, issue such license.

Section 6373-9. The law further requires that even **after a dealer has secured a license** in the manner provided therein, he or it must, before the sale of stock of **any** company is permitted, procure, or have the company whose securities he intends to sell procure, a certification of the "commissioner," authorizing **the sale of that particular security**.

Section 6373-14. And if the issue is for the organizing or promoting of any company or for the flotation of the securities of any company after organization, additional information shall be filed as required by Section 14.

Section 6373-16. **If the commissioner finds that the applicant has complied with the law, is not fraudulently conducting its business, is not proposing to dispose of its securities on grossly unfair terms and is solvent,** a certificate authorizing the disposal of such securities shall issue, but if the commissioner does not so find the certificate must be refused. It must be issued or denied within a **reasonable time** after the application for it is made, which time shall be within **thirty days** after the applicant, or certificate holder whose certificate has been revoked, has **fully complied with** all the requirements of the act, but as the **commissioner is the sole judge of what constitutes compliance,** and as the examination, especially of large concerns, would in some instances be prolonged and at times have to be conducted at distant points in this or another country, **the issue of a certificate may be delayed indefinitely and beyond the thirty-day limit.**

That such delays are an interference with interstate commerce and wholly beyond the authority of the police power, is, in our opinion, without question. During the period of **twenty days** after the application is made and data filed with the commissioner, there can be no sale of the securities (unless the commissioner sees fit under Section 6373-4. Under the last named section it is wholly discretionary with him whether he shall grant a temporary license, and the same may be arbitrarily withheld by him). After the license is issued there may be a further delay of thirty days or even longer, and any company, or person which issues and sells, or any dealer who sells during such period may be guilty of a felony. **This is the law without regard to the character**

of the securities. They may be of the highest quality in every respect. The emergency requiring immediate sale may be extreme; these considerations cut no figure; the law proclaims a twenty day—a thirty day—or a fifty day paralysis. If a company perfectly solvent but in need immediately of ready money, arranges a bond issue and has people ready to purchase the bonds, nothing can be done until a license is received, nor until a certificate is issued, and this may be a period of **fifty days.** In the meantime things must stop. When we observe a non-resident, owning stocks or bonds of the highest quality, and upon which no criticism has been or can be made, and who desires to sell them in Ohio to some one who there desires to buy, is totally forbidden so to do for a period of thirty days on penalty of a felony, and that there is no machinery of the law by which he can get permission or approval until the twenty day period, it is clear enough that the restraint is substantial and direct. Such a provision bears no **reasonable relation** to the public health or the public morals, or even to the "public welfare" in the broadest conceivable sense of the phrase.

Section 6373-6 and 7. And within five days after such license may have been issued, the commissioner may revoke the same upon "ascertaining" (the manner of which is not pointed out) that the licensee (a) is of bad repute, (b) has violated any provision of this act (c) has engaged or is about to engage, under favor of such license, in illegal business or any fraudulent transactions. And such dealer cannot be re-licensed for a period of **six months.**

The information required of a foreign corporation under the provisions of Section 6373-3, Section 6373-9, Section 6373-14, as a condition precedent to such corporation's right to transact a lawful business, has been held by this court in International Text Book Company vs. Pigg, 217 U. S., 91, and Buck Stove Company vs. Vickers, 226 U. S., 205, to impose a direct burden on interstate commerce, because it is not competent for a state legislature to prescribe, as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock, authorized and paid up, and its par and market value, as to its assets, liabilities, officers, trustees, directors, manager, and stockholders, with a showing of the stockholdings of each of the latter and the amount paid on his holdings, and the post-office address of all of such above named persons. This was likewise denounced in Crutcher vs. Kentucky, 141 U. S., 47.

Section 6373-3. "If the applicant be a corporation organized under the laws of **any other state,** etc., it shall file additional information."

Section 6373-9. "If the securities be of a taxing subdivision of **any other state province of foreign government** * * * (additional information is required).

Section 6373-10 (f). The information required in the preceding Section 9 need not be filed "where the disposal is made for a commission of less than one percentum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange, and who has an established and lawfully conducted place of business **in this state,** regularly open for public patronage as such."

Section 6373-14. "This section shall not apply * * * where the securities are those of a common carrier, or of a company organized under the laws of **this state.** * * * And the whole or a part of the property, upon which such securities are predicated, is located within **this state.**

The above burdens which the act imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers and Crutcher cases, and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable.

II.

THE LAW DEPRIVES OF PROPERTY WITHOUT DUE PROCESS.

The act must be further tested by its effect upon the citizen's **right to pursue a lawful calling**. That the act transcends the legislative exercise of the police power, and that the business sought to be regulated is not one affected with a public interest, has been discussed at length in this brief on pages and nothing further need be said at this time on that question.

Legitimate commercial transactions, such as the disposal of securities of the kind contemplated by the act, cannot be regulated by legislative enactment. The act in question seeks to regulate **private transactions**. But the person, natural or artificial, that sells securities based upon reasonable value, is entitled to the protection and same safeguards as the man who sells clothing, dry

goods, groceries, or hardware, or engages in other business that is not affected by a public interest. See Butcher's Union Co. vs. Crescent City Co., 111 U. S., 746 at 763.

It is said in Allgeyer vs. Louisiana, 156 U. S., 578 at 589, that the liberty mentioned in the fourteenth amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

If an insurer or owner of or dealer in securities issued in good faith and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal, he is deprived not only of his property, within the meaning of the constitution, by taking from him one of the incidents of ownership, but also of his liberty, as appears from Mr. Justice Matthews' saying in 118 U. S., 356 at 370, that:

> "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Section 6373-9. "Before such licensee shall dispose of such securities, he shall file with the commissioner * * * **the approximate price at which the licensee purposes to dispose of such securities."**

Section 6373-16. "The said commissioner shall have power to make such examination of the securities * * * **as he may deem advisable,** and if it shall appear that * * * the proposed disposal of such securities is not on **grossly unfair terms** * * * the commissioner shall issue his certificate to that effect, authorizing such disposal.

In other words, no stocks, bonds or other securities shall be sold within this state unless the commissioner thinks that **they are worth the price which is asked**. The act does not put it quite so baldly, but the language can mean nothing else. If after such a finding is made, the property is sold to a careful purchaser, who is in no way misled, but buys just what he wants and pays what he thinks it is worth, the seller may be imprisoned in the penitentiary; and it would be quite immaterial that the commissioner was wrong, and that the security sold was in fact worth the price. The element of fraud is wholly eliminated from this part of the statute, and all the dependent police power to protect the citizen against fraud must concurrently disappear. No definition of the police power which we have seen is broad enough to cover such prohibition, and we are aware of no consideration which even plausibly supports its validity.

It may be assumed that the commissioner is more experienced and wiser than two citizens who desire to buy and sell property, with which they are familiar, at the price they have agreed upon; it may be assumed that the commissioner can foresee the coming events which would bring profit or loss on a proposed investment; but it has never yet been supposed by any court or textwriter that it was within the police power of the

state to decide for its citizens **the financial advisability of their investments,** so long as the investors were not misled or deceived.

Section 6373-4; Section 6373-16. The delays occasioned by the above provisions are alike fatal to the due process clause of the constitution. Such a provision is an arbitrary and oppressive interference with **the right of contract.**

There is no provision in the statute for a hearing of any kind.

Every investigation and examination authorized is **ex parte,** without permission to the applicant, whether dealer or issuer, to pay one word in defense, even of his good repute or of the charge that he is engaging in illegal or fraudulent business.

By Section 6373-4 it is provided that if the commissioner **be satisfied** of the "good repute" in business of the applicant, he shall register such applicant. This state of mind of the commissioner may be the result of "such investigation **as he may deem necessary**" Section 6373-3, (c), and, of course, if he does not deem such investigation necessary, it is optional with him whether **any** such inquiry or investigation is made.

Section 6373-6. It is provided that such commissioner may revoke such license upon "ascertaining" that the licensee (a) is of "bad business repute;" (b) has violated any provision of this act; (c) has engaged or is about to engage, under favor of such license, in "illegal business" or "faudulent transactions." The method of such ascertaining is not pointed out, and of all of the above things, the commissioner is to be the **sole judge.**

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Before the dealer or issuer can dispose of one share of stock he must file the information provided for by Section 9 and in certain cases, also that provided for in Section 14. This must be done before the commissioner is required to make any examination of the securities proposed to be sold.

Section 6373-16. "Said commissioner shall have power to make such examination of the securities or of the property named in the next preceding sections **as he may deem advisable.**"

Whether he makes any such examination at all is therefore wholly optional with him.

Some of the other arbitrary powers conferred upon the commissioner are as follows:

Section 6373-4. The commissioner may arbitrarily delay passing upon an application for twenty days, and he may or may not grant or revoke temporary permission to transact business.

Section 6373-6. He **may** revoke or refuse to issue, at any time, the license of the licensee if he deems him of bad repute, and of these things he is to be the **sole judge**.

Section 6373-10. The commissioner can require the information provided for in Section 9 or not, just as he sees fit. So also can he approve or not approve the manual which contains certain information, and he is to be the **sole judge** as to whether such licensee has an established and lawfully conducted place of business, or whether the stock exchange to which he belongs is regularly organized.

Section 6373-14. The commissioner has power to determine whether an underwriter acts in good faith.

Section 6373-16. The commissioner **may** wait thirty days before issuing his certificate.

Of all of the above things, the commissioner is to be the **sole judge**.

The applicant whether a dealer or issuer, is not permitted to be heard as to the granting or revocation of a license, or the award of a certificate, on the important question of his own good repute, his alleged violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms on which his disposals are made, or his own insolvency. No rules of procedure are prescribed in accordance with which the investigation shall be made, or is the commissioner required to establish any rule or regulations as to what shall constitute good repute, insolvency or fraudulent conduct. He may, at will, deal with each case as it arises, and vary his course to suit his pleasure. He is at liberty to hear, as he chooses, only evidence favorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even whim and caprice (if he gives them play) of the commissioner or of his assistant (subject to the commissioner's supervision) may not only halt, but injure and perhaps destroy a worthy business enterprise and cast a cloud on the name of the applicant or licensee, and when such applicant or licensee seeks redress in the courts he must assume the burden of disproving the findings made against him, however groundless they may be.

As was said in the course of the opinion in the Michigan case, with respect to such language as "good repute" and "unfair terms,"—"broader and vaguer lan-

guage could not be chosen. It subjects to the practically uncontrolled discretion of the commissioner every issue or general sale of stocks, bonds or securities hereinafter to be made."

It is true (Section 6373-8) that one whose license shall be revoked, or to whom a renewal of license may be denied, has a species of court procedure accorded him, but he is remitted to the Franklin county court and thus is, in effect, denied access to the federal court. That this is a clear violation of the federal constitution of the United States is shown in Butler Bros. Shoe Co. vs. U. S. Rubber Company, 156 Fed. Rep., 1.

In this court proceeding provided by Section 8, the **burden of proof** shall rest upon the plaintiff to disprove the grounds assigned and specified by the commissioner. Even if it did not contain this monstrous and unheard of provision, the procedure provided for results in fatal delay. The commissioner does not have to answer for one week after the return day; an application for advancement must then be filed before the case can be heard. During this period, no provision is made for the protection of the applicant. (Nor is there during the twenty day period pending the application, except the temporary license which the commissioner "may" grant or not as he sees fit.) Added to this the thirty day delay provided for by Section 6373-16 (during which time the commissioner may investigate the securities to be sold) and may of the most valuable businesses known to the commercial world may, by market changes or other reasons, be absolutely and irrevocably ruined.

Section 6373-24. "The superintendent of banks, as commissioner under this act, is hereby authorized to

appoint an assistant commissioner * * * subject to the supervision of such commissioner he may perform all the duties imposed upon, and have all the powers granted to such commissioner under the provisions of this act."

By the above it is at once seen that this political appointee of the commissioner, who is also a political appointee, is the important power which holds sway over the vast stock and bond business of the state, and is a part of the "process" which is to be used under the provisions of the act for affecting the rights of those to whom the act applies.

Certainly it cannot be said that due process of law permits the imposition of the foregoing burden, and foregoing conditions on the right to prosecute **private** business.

III.

THE ACT DENIES TO PERSONS WITHIN THE STATE OF OHIO THE EQUAL PROTECTION OF THE LAW.

The act in question, in its provisions of inclusion and exclusion, both as to the kinds of securities which may or may not be sold, and the persons who may sell the same, is **discriminatory** in the extreme, such discrimination being, in almost every case, arbitrary, unjust, without reasonable ground and without bearing any relation to the expressed object of the act, viz., the prevention of fraud in the sale of stocks, bonds, etc.

EXCEPTIONS.

By the terms of Sections 6373-1 and 6373-2, the following stocks, bonds and securities may be sold by **any one,** without regard to their value, without regard to the fraudulent nature of the transaction, without regard to the character of the "disposee" and without his complying with a single provision of the act.

Section 6373-1.

(a) Stocks of a corporation not for profit.
(b) Bonds of a taxing subdivision of **this state**.

This latter is clearly an unjust discrimination.

Section 6373-2.

"Providing that the same have not been judicially declared invalid, and where, at the time of the sale there is no default in the payment of any part of the interest or principle.

(c) Mortgage bonds and notes (other than corporate) secured by bona fide mortgage on real estate.

(d) Corporate bonds and notes where more than fifty per cent of the entire issue is included in a sale to one purchaser.

The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the provisions of the law, although its securities may be of the highest financial character.

(e) Securities of quasi public corporations, where the issuance has been authorized by the public service commission of **this state**.

(f) Stocks and bonds of any national bank.
(g) Stocks and bonds of any bank or organized under the laws of **this s**.
(h) Stocks and bonds of any trust company organized under the laws of **this state**.
(i) Stocks and bonds of any building and loan association organized under the laws of **this state**.

All of the above discriminations appear to us unjust, unreasonable and bear absolutely no relation to the expressed object of the act.

Any of the following persons, firms or corporations may sell **any stock or security** regardless of its value, without regard to the fraudulent nature of the transaction, without regard to the character or reputation of the disposee, and without his complying with a single provision of the act.

Section 6373-2.

(a) A national bank.
(b) An owner, not the issuer, who disposes of his own property, for his own account, when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner.

Such an owner is at liberty to dispose of his holdings for his own account regardless of the statute, providing he can do so without resorting to repeated and successive transactions of similar character; but if such transactions are expedient or necessary, he may not sell, unless, at inconvenience and financial cost and through delay and the commissioner's approving stamp of "good repute in business" he obtains a dealer's license so to do.

(c) An owner, **a natural person** other than the underwriter who disposes of his own property for his own account.

By the above provision, such natural person, whether he be of good repute or not in business, may dispose of them for his own account, but the underwriter, although he may possess the same moral qualities and wealth, or out-rank him in both, may not dispose of his holdings except by compliance with the none too clear provisions of the act.

Although a natural **person** may dispose of his holdings as above indicated, a **partisanship** or **association** may not do so.

(d) One in a **trust capacity** created by any law of the United States or of this or any other state by judicial power, lawfully disposing of any property embraced within such trust.

(e) A bank or trust company organized under the laws of **this state,** selling a security for a licensee other than the underwriter, at a commission of not more than two per cent, where such bank or trust company is not a regular dealer in securities.

(f) One not the issuer who disposes of securities to a licensee or to a company which, as a part of its regular business, deals in or holds such securities.

(g) A **pledgee** selling, in the ordinary course of business, a security pledged to him as security for debt, in good faith and not for the purpose of avoiding this act.

(h) The issuer organized under the laws of **this state** where the disposal is in good faith and not for the purpose of avoiding this act, is made for the sole account of the issuer, without **any commission** and at a total expense of not more than two per cent of the proceedings realized therefrom plus five hundred dollars, and where **no part of the issue to be disposed of is issued directly or indirectly in payment of patents, services, good will or for property not located in this state.**

Section 6373-9.

"Before such licensee shall dispose of any such securities within this state, he shall file with such commissioner in such form as shall be determined by him, the following information concerning said security. * * * If the securities be of a taxing subdivision **of any other state,** territory, province or foreign government, there shall be filed in addition thereto a statement of the licensee, setting forth the nature of the obligation of such securities, how payment of the same is secured, and that, to the best of his knowledge, there is any default in the payment of any part of the interest or principle of such securities and are nomadjudications, adversely affecting, or pending suits questioning the validity of the same."

Section 6373-10.

"The information required in the preceding section **need not be filed unless required by the commissioner**.

(a) If the case has been filed by any other licensee.

(b) If actual current sales of the securities, at prices quoted, shall have been, from time to time, for not less than six months next preceding such disposal, published in the regular market reports of the news columns of a daily newspaper of general circulation in this state."

The exemptions based on market reports of a daily newspaper, as above provided, would fail to embrace large numbers of meritorious issues of the different classes of securities, for it is well known that many securities are not listed on the market.

(e) "Where there is a disposal of securities, the price paid or the consideration rendered for which, in a single transaction, by one disposee shall amount to five thousand dollars or more."

It will be seen that the above can have no application to an issuer if some disposee is found who, in a single transaction, acquired securities of a given issue to the amount of five thousand dollars or more. There are many worthy concerns, each capitalized for a considerable sum, in which no one's investment reaches that amount.

The above provision has the effect of putting a premium upon fraud, for if the amount of the sale is big enough, no matter how fraudulent or how unfair the price, it is not subject to the terms of this act. What becomes then of the "protection" to the "rich" widow and orphans? Surely they are entitled to, and in most cases need, much more protection than the poor ones.

> (d) "Where the securities disposed of are those of **manufacturing** or **transportation** companies, or of **common carriers** or other public utilities * * * "

> (e) "Where the information required, other than the approximate selling price, is contained in any standard manual of information, approved by such commissioner."

The above section leaves with the commissioner the sole determination as to whether any information shall be filed or not, simply upon his approval or non-approval of such manual of information.

> (f) "Where the disposal is made for a commission of less than one per centum of the par value thereof, by a licensee who is a member of a regularly organized and recognized stock exchange, and who has an established and lawfully conducted place of business in **this state**, regularly open for public patronage as such."

And of all of this the commissioner is to be the **sole judge**.

And it will be noticed that although one comes within all of the above exceptions, still he may not be excused from filing the information provided by Section 9, if "required" by the commissioner so to do.

Section 6373-14.

> "For the purpose of organizing or promoting any company or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities, and no person or company for or on behalf of such issuer or underwriter, shall dispose or attempt to dispose of any such securities * * * without filing additional information provided for by Sections (a), (b), (c), (d) and (e).
>
> This section shall not apply * * * where the sale is made by or on behalf of an underwriter, who, in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him, and pays therefor in cash or its equivalent, before attempting to sell the same, not less than ninety per centum of the price that such securities are therefor sold by him; nor where the securities are those of a common carrier or of a company organized under the laws of **this state**, and engaged principally in the business of manufacturing, transportation, coal mining or quarrying * * * "

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 941. 438

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

THE GEIGER-JONES COMPANY.

No. 942. 439

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

DON C. COULTRAP.

No. [redacted] 440

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO; CYRUS LOCHER, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO, AND WILLIAM T. SMITH, SHERIFF OF CUYAHOGA COUNTY, OHIO, APPELLANTS,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO MANUFACTURING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MOTION TO ADVANCE.

EDWARD C. TURNER,
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

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HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, APPELLANT,

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THE GEIGER-JONES COMPANY.

No. 942.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO, APPELLANT,

vs.

DON C. COULTRAP.

No. 943.

HARRY T. HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO; CYRUS LOCHER, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO, AND WILLIAM T. SMITH, SHERIFF OF CUYAHOGA COUNTY, OHIO, APPELLANTS,

vs.

WILLIAM R. ROSE AND THE RICHARD AUTO MANUFACTURING COMPANY.

MOTION TO ADVANCE.

Comes now the Attorney General of the State of Ohio, as solicitor for appellants, and moves the court to advance the above-entitled causes for hearing on a date convenient to the court.

The above-entitled causes are appeals under section 266 of the Judicial Code from orders of the District Court of the United States for the Southern District of Ohio, Eastern Division, allowing interlocutory injunctions against appellants suspending and restraining the enforcement, operation, and execution of certain statutes of the State of Ohio, to wit, sections 6373-1 to 6373-24, both inclusive, of the General Code of Ohio, said sections having been duly enacted by the legislature of Ohio at its regular session in the year of 1913 as an act entitled "To regulate the sale of bonds, stocks, and other securities and real estate not located in Ohio and to prevent fraud in such sale," which said act is contained in volume 103 of the Laws of Ohio, pages 743 to 753, as amended 104 Ohio Laws, pages 110 to 119, inclusive, and as amended 106 Ohio Laws, pages 363 and 364, inclusive.

Said interlocutory injunctions each restrain the action of Harry T. Hall, the duly appointed, qualified, and acting Superintendent of Banks of Ohio, in the enforcement and execution of said statutes and said acts.

Said interlocutory injunction in cause No. 943 also restrains the action of Cyrus Locher, the duly elected, qualified and acting prosecuting attorney of Cuyahoga County, Ohio, and of William T. Smith, the duly elected, qualified, and acting sheriff of said Cuyahoga County, in the enforcement and execution of said statutes and said acts.

Said statutes and acts of Ohio seek to protect the citizens of Ohio from fraud in the sale in Ohio of certain kinds of stocks, bonds, and other securities not listed on some regular stock exchange, or whose values may not be ascertained from the market reports of a daily newspaper published in the State of Ohio or in some standard manual of information, as well as to protect the citizens of the State of Ohio against fraud in the sale in Ohio by other than the owner, *bona fide,* of real estate not located in Ohio.

Said court has declared said statutes and acts and all parts thereof null and void, not only as to citizens and cor-

porations of other States attempting to transact such business in Ohio, but as to citizens and corporations of Ohio as well.

Said legislation was passed in pursuance of an amendment to the Constitution of Ohio, which constitutional amendment was adopted by the people of Ohio in September, 1912, and became effective on January 1, 1913.

More than twenty other States of the United States have passed similar legislation involving identical principles of law and constitutional interpretation.

It is of the greatest importance to both the citizens and government of the State of Ohio, as well as to the citizens and government of many other States of the United States, that the power of the respective States to protect their citizens against fraud by the enforcement of such legislation be speedily determined. Pending such determination the functions of an important department of the government of the State of Ohio are being seriously interfered with by said interlocutory injunctions.

The Attorney General of Ohio as solicitor for appellants therefore urges that such special and peculiar circumstances exist in connection with the said several causes as to justify the court in advancing said causes and taking them up out of their regular order on the docket.

Respectfully submitted,

EDWARD C. TURNER,
Attorney General of Ohio,
Solicitor for Appellants.

(30955)

HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO *v.* GEIGER-JONES COMPANY.[1]

HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO *v.* COULTRAP.

HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO ET AL. *v.* ROSE ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 438, 439, 440. Argued October 16, 17, 1916.—Decided January 22, 1917.

The Ohio "Blue Sky Law," Supplement to Page & Adams' Ann. Gen. Code of Ohio, 1916, vol. 2, §§ 6373-1 to 6373-24, examined as to its constitutionality and upheld.

In the exercise of the power to prevent fraud and imposition, *Hutchinson Ice Cream Co.* v. *Iowa, ante,* 153, a State may forbid dealing in stocks and other securities within its borders without a license, and subject the business to executive supervision.

The liability of a business to regulation is not necessarily dependent upon its liability to be abolished under the police power.

Under the so-called "Blue Sky Law" of Ohio, dealers within its provisions (including companies floating their own issues) are not licensed to sell stocks and other securities unless an executive officer designated is satisfied of the good business repute of the applicants and their agents, and licenses, when issued, may be revoked by him upon ascertaining that the licensees are of bad business repute, have violated any provision of the act, or have engaged, or are about to engage, under favor of their licenses, in illegitimate business or fraudu-

[1] These cases, together with *Caldwell et al.* v. *Sioux Falls Stock Yards Co. et al., post,* 559, involving the "Blue Sky Law" of South Dakota, and *Merrick et al.* v. *Halsey & Co. et al., post,* 568, involving the "Blue Sky Law" of Michigan, have been styled for convenience "The Blue Sky Cases."

lent transactions; his findings, however, are made subject to judicial review. *Held*, that the powers thus conferred are not arbitrary but consistent with due process under the Fourteenth Amendment. *Gundling* v. *Chicago*, 177 U. S. 183.

The fact that the statute designates a particular court to review the executive findings does not affect its validity.

It is to be presumed that the executive officer will act properly in the public interest, and not wantonly or arbitrarily.

Whether there is a constitutional liberty to buy securities on one's own judgment of value without governmental interposition to protect from bad bargains—will not be determined at the suit of parties whose rights are involved only from the standpoint of sellers; but *Quære:* Whether the state power does not extend to such guardianship over buyers.

The equal protection clause of the Fourteenth Amendment leaves the States at liberty to regulate those activities which they deem conspicuous sources of existing evils, without embracing others which, but for this distinction, would fall in the same class.

A state law designed to prevent fraud in the selling of securities, which affects securities coming from other States only in requiring that persons dealing in them within the State shall be first licensed, shall file information concerning them and be subject in such dealing to executive supervision, is not invalid as a direct burden on interstate commerce.

Quære: As to when and under what circumstances securities transported into a State may be held to have lost their interstate character?

230 Fed. Rep. 233, reversed.

THESE cases were heard together in the District Court and there disposed of in one opinion. They were argued and submitted together here. The bills of complaint attacked from different angles the so-called Blue Sky Law of the State of Ohio, which provides:

"Sec. 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association

(except corporations not for profit,) or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided. . . .

"Sec. 6373-2. . . . The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

"(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a *bona fide* owner of the security and disposes of his own property for his own account;

* * * * * * * *

"As used in this act, the term 'company' shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; . . ."

The Geiger-Jones Company is an Ohio corporation, licensed to do the business of buying and selling investment securities and of buying and selling the stocks and bonds of industrial corporations. It has a regularly established clientage, it alleges, of about 11,000 persons residing in the State of Ohio and other States and has sold and there are now outstanding in the hands of persons to whom it has sold securities of about twenty to twenty-five million dollars, par value, and has stockholders in Ohio and other States. That the securities above referred to consist of securities of over twenty corporations of Ohio and other States and foreign countries. That it is still selling such

securities and is and has been engaged in intrastate, interstate and foreign commerce.

The appellee, Don C. Coultrap, in No. 439 repeats the allegations made by Geiger-Jones Company, with enumeration of some of the companies in whose stocks and securities that corporation is engaged in dealing, and alleges that he is the owner and holder of its stocks and of the stocks of other companies and is engaged in buying and selling and offering to sell such stocks in the State of Ohio and in the State of Pennsylvania, and in the course of such transactions travels back and forth between those States and conducts a correspondence from Pennsylvania to Ohio and receives certificates evidencing the ownership of stock from the State of Ohio and sends them from Pennsylvania to Ohio.

William R. Rose, one of the appellees in No. 440, alleges himself to be a citizen of Ohio and engaged in that State in the business of buying and selling investment securities and particularly the stocks and bonds of industrial corporations and that he has built up and maintained a large and profitable business and an enviable reputation.

The RiChard Auto Manufacturing Company, the other appellee, is a corporation of West Virginia but has its principal place of business in Cleveland, Ohio, and has a contract to manufacture and is ready to manufacture automobiles under certain patents obtained by Francois RiChard as soon as and not until the stock of the company can be put upon the market and a sufficient amount realized therefrom for such purposes.

That on September 25, 1914, and prior thereto, Rose was actively engaged in buying and selling stocks and bonds of industrial corporations and investment securities in general, and particularly the stock of the RiChard Auto Manufacturing Company, of which company he was the secretary, and for which business he had unusual aptitude and was able to prosecute more successfully "than any

other man whose services were available to said corporation."

That on September 25th he was arrested upon an affidavit filed by one H. R. Young, a subordinate and deputy of the state superintendent of banks and banking for the State of Ohio, under whose immediate direction and control he was then acting. Rose, upon being taken before a magistrate, waived examination and was "bound over to the grand jury" of Cuyahoga County, which jury subsequently returned an indictment against him for violation of the law

The grievance alleged in Nos. 438 and 439 is that under the laws of the State the Attorney General is threatening to give an opinion to Hall, the superintendent of banks and banking, that the law is valid and that it is the duty of Hall to cancel appellees' license and that this will result in irreparable injury to appellees and to their security holders from the publicity they will obtain. And it is apprehended that Hall will act on such advice, believing that he is bound by the opinion of the Attorney General.

The statute is attached to the bills and is asserted to be unconstitutional, invalid and void and the particulars are enumerated to be that it will deprive appellees of their property without due process of law, deny them the equal protection of the laws, impose burdens on interstate commerce, confer executive powers, delegate such powers and legislative powers in violation of the constitution of Ohio. Appellees consider themselves remediless except in equity and pray injunctions interlocutory and permanent.

The complaint of Rose and the Auto Company is that Hall, superintendent of banks and banking, is actively engaged in the prosecution of the proceedings against Rose and has, together with the prosecuting attorney, interfered with, interrupted and completely prevented Rose from carrying on his business in the State of Ohio and especially in attempting upon his part to dispose of and

sell the stock of the Auto Company, and that the prosecuting attorney and the sheriff of Cuyahoga County, unless restrained, will assist and actively coöperate with Hall, to the great and irreparable injury of both Rose and the Auto Company.

The charge is amplified by details which it is unnecessary to give and the law is charged to be unconstitutional in the same particulars as those enumerated by the Geiger-Jones Company.

Injunctions temporary and perpetual are prayed.

The District Court in the Geiger-Jones case considered that it was without power to enjoin the Attorney General but decided that it could and should under the charges of the bill restrain Hall from further action under the law, the restraint to continue until the hearing and determination of the applications of the respective complainants for interlocutory injunctions.

The applications subsequently came to be heard before three judges, and Hall and all of his employees and subordinates were enjoined from attempting to enforce the provisions of the law. There was an exception in No. 440 as follows: " . . . except such proceedings as may be deemed proper in any criminal action pending against said complainants or either of them when the complaint in this cause was filed." The injunctions in all the cases were to continue until final decision or further order of the court. The court declared the law to be obnoxious to all of the charges made by the respective complainants against it. 230 Fed. Rep. 233.

Mr. Edward C. Turner, Attorney General of the State of Ohio, for appellants.

Mr. John A. Shauck and *Mr. Timothy S. Hogan*, with whom *Mr. A. M. McCarty*, *Mr. E. N. Huggins*, *Mr. M. B. Johnson*, *Mr. H. H. Johnson* and *Mr. Francis R. Marvin* were on the briefs, for appellees:

Cases of the type of *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, involving insurance and other kinds of business upon which the public is peculiarly dependent and which are not made up of ordinary commercial transactions, and cases like *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, involving methods of business which by their very nature are harmful, have no application to a law like this which assumes to regulate and forbid the normal contracts of commerce.

The act is clearly void (1) because it permits the commissioner arbitrarily, by granting or refusing licenses, to tolerate or destroy the right to carry on an ordinary calling and to exercise a guaranteed right of contract, (2) because it authorizes him to place forbidden restrictions and burdens on the conduct of business after a license has been obtained, and (3) because of the provisions which invest him with arbitrary power to revoke licenses.

Another vice which pervades the entire act is the requirement that before obtaining a license an applicant shall consent to be sued in a particular county and file an irrevocable authority with a state officer to accept service of process. This denies the equal protection of the state laws which, as to other defendants, make a different and more favorable provision as to both venue and service.

There is no attempt to exercise legislative power in prescribing the qualifications of the person who may be entitled to receive a license to exercise dominion over his own property or to engage in interstate commerce. Both standards of qualification in a licensee and compliance with them are left to the exclusive and arbitrary will of the commissioner. Whether the act is condemned as a forbidden attempt to delegate legislative power, as has been done in some cases, or as an attempt to confer arbitrary power, as in others, it is in this respect violative of all the guarantees which we invoke.

The applicant for a license has no right to a hearing upon his application, nor has the holder of a license a right to be heard upon notice looking to its revocation.

The applicant must submit to the commissioner the particulars of his business and business agencies. The commissioner may make such further investigation as he may deem necessary concerning good repute, and then, if he be satisfied in that regard and the fees and expenses demanded are paid, the applicant may have a license to deal in the securities, and not otherwise. Less flagrant legislation has been condemned in numerous cases, among which are *Harmon* v. *State*, 66 Ohio St. 249; *City of Richmond* v. *Dudley*, 129 Indiana, 112; *Bills* v. *City of Goshen*, 117 Indiana, 221; *Mayor* v. *Radecke*, 49 Maryland, 217; *State* v. *Tenent*, 110 N. Car. 609; *Gambad* v. *Deering*, 84 Wisconsin, 585; *Cicero Lumber Co.* v. *Town of Cicero*, 176 Illinois, 9; *Noel* v. *People*, 187 Illinois, 587; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Moskowitz* v. *Jenkins*, 202 N. Y. 53.

The proclaimed virtue of the act is its vice. While in form it conditions and, under circumstances which are likely to arise, it prohibits sales, at the same time it necessarily prevents purchases, and thereby shields contemplating purchasers from the exercise of their own defective judgments. For it is to be borne in mind that the terms of the act operate upon honest sales as well as those which are fraudulent. In all transactions within its purview it places the citizens of the State under guardianship and deprives them of dominion over their property which is an essential element of its ownership. See *Smith* v. *Burlingame*, 4 Mason, 121.

The act is also objectionable for the very numerous discriminations which deny the equal protection of the laws under the Fourteenth Amendment.

The prevention of fraud is within the power of the legis-

lature without interfering with the freedom of normal commerce.

Bearing in mind the principles announced in *Hannibal & St. Joseph R. R. Co.* v. *Husen*, 95 U. S. 465, and in *Welton* v. *Missouri*, 91 U. S. 275, it is plain that the act contravenes the commerce clause. *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, 213–216; *Lottery Case*, 188 U. S. 321; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.*, 156 Fed. Rep. 1.

Nathan v. *Louisiana*, 8 How. 73, and *Paul* v. *Virginia*, 8 Wall. 168, are not opposed to this contention.

Transportation is by no means the only element of commerce. *Lyng* v. *Michigan*, 135 U. S. 161; Story on the Constitution, § 1072. Commerce is intercourse and traffic. When an order comes from another State to a dealer in Ohio for stocks and bonds, the sale occurs at his place of business, and this sale is one of the ingredients of the transaction, which is interstate commerce. The act regulates and conditions the right to effect such sale. Thus it appears that the very first element of interstate commerce is prohibited unless permitted by the State. Also, if the dealer is prohibited from selling, the result is to prohibit him from importing securities for sale. The act, therefore, forbids all traffic in articles of interstate commerce so long as sales are to be effected in Ohio. *Buck Stove & Range Co.* v. *Vickers*, *supra*.

The business being predominantly private and therefore not subject to the police power of the State in any instance, the latter cannot afford a justification for this interference with interstate commerce. *Adams Express Co.* v. *New York*, 232 U. S. 314; *Haskell* v. *Cowham*, 109 C. C. A. 235; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75.

The amendment of the constitution of Ohio is without effect in this case.

Mr. George Cosson, Attorney General of the State of Iowa, and *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ* on behalf of the National Association of Attorneys General of the United States.

Mr. George W. Wickersham, Mr. Robert R. Reed and *Mr. Charles K. Allen*, by leave of court, filed a brief as *amici curiæ* on behalf of the Investment Bankers Association of America.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

It will be observed that these cases bring here for judgment an asserted conflict between national power and state power, and bring, besides, power of the State as limited or forbidden by the National Constitution.

The assertion of such conflict and limitation is an ever-recurring one; and yet it is approached as if it were a new thing under the sun. The primary postulate of the State is that the law under review is an exercise of the police power of the State, and that power, we have said, is the least limitable of the exercises of government. *Sligh* v. *Kirkwood*, 237 U. S. 52. We get no accurate idea of its limitations by opposing to it the declarations of the Fourteenth Amendment that no person shall be deprived of his life, liberty or property without due process of law or denied the equal protection of the laws. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110. A stricter inquiry is necessary, and we must consider what it is of life, liberty and property that the Constitution protects.

What life is and what may or may not affect it, we have quite accurate tests; and what liberty is in its outside sense, and, in like sense, what property is. We know that it is of the essence of liberty—indeed, we may say, of life—that there shall be freedom of conduct, and yet there may

be limitations upon such freedom. We know that in the concept of property there are the rights of its acquisition, disposition and enjoyment—in a word, dominion over it. Yet all of these rights may be regulated. Such are the declarations of the cases, become platitudes by frequent repetition and many instances of application.

The question then is, Is the statute of Ohio within the principles declared? The statute is a restraint upon the disposition of certain property, and requires dealers in securities evidencing title to or interest in such property to obtain a license—a requirement simple enough in itself and yet of itself asserted to be an illegal control of a private business, made especially so by the conditions which are imposed. These conditions, summarized, are as follows:

To obtain the license there must be filed with the superintendent of banks and banking (termed in the act "commissioner") application for such license, together with information in such form as the commissioner shall determine, setting forth:

"(a) The names and addresses of the directors and officers if such applicant be a corporation or association and of all partners if it be a partnership, and of the person if the applicant be an individual, together with names and addresses of all agents of such applicant assisting in the disposal of such securities;

"(b) Location of the applicant's principal office and of his principal office in the state, if any;

"(c) The general plan and character of the business of said applicant, together with references which the 'commissioner' shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners and agents.

"If the applicant be a corporation organized under the laws of any other state, territory or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation, certified by the proper

officer of such state, territory or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement."

The applicant is also required to file a written instrument irrevocably consenting to be sued in a particular county and, if personal service there cannot be had, consenting to service upon the sheriff of the county.

It is also provided that all of the applications shall be published in a daily newspaper and if the commissioner be satisfied that the applicant is of good business repute, he shall, upon payment of certain fees, register the applicant as a licensed dealer in securities. Pending disposition of the application temporary permission to transact business may be given. Yearly renewals of the licenses are provided for.

The commissioner may revoke a license upon ascertaining that the licensee: (a) is of bad business repute; (b) has violated any provision of the act; or (c) has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions.

It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed, that is, to use the language of a cited case, "speculative schemes which have no more basis than so many feet of 'blue sky'"; or, as stated by counsel in another case, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations." Even if the descriptions be regarded as rhetorical, the existence of evil is

indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government and that the appreciation of the consequences of it is not open for our review. *The Trading Stamp Cases,* 240 U. S. 342, 391. Therefore, the purpose being legal, the question only remains whether the manner in which it is accomplished is illegal. This is contended, and the provisions which render the law void are found, it is stated, in: (1) Power conferred upon the commissioner to grant or refuse licenses; (2) the authority given the commissioner to place forbidden restrictions and burdens on the conduct of the business of one who has obtained a license.

The basis of these contentions is that the law confers arbitrary power upon the commissioner. In considering the contentions we must keep in mind that the law is addressed to a complex situation. Its purpose is, as we have seen, to give a basis for judgment of the securities offered the purchasing public; assure credit where it is deserved and confidence to investment and trading; prevent deception and save credulity and ignorance from imposition, as far as this can be done by the approved reputation of the seller of the securities and authoritative information.

It may, however, be said that character establishes itself and neither needs nor can be compelled to accept the stamp of government, and it is asserted that the "normal investment business of the country" and its "individual transactions" are not subject to "executive control," the broad contention being made that as such business cannot be prohibited it cannot be regulated. This, indeed, is the basic principle of the opposition to the statute. It is expressed in many ways, and the various provisions of the statute—those that are explicit in direction to the commissioner and those that commit discretion to him—are said to so burden and complicate "normal business as to

make it difficult if not impossible to carry it on in a normal way, if at all."

As broadly made, we cannot assent to these propositions. The reason and extent of the law we have indicated and the control to which individual transactions are subjected, and we think both are within the competency of the State. It is to be remembered that the value of securities consists in what they represent, and to determine such value is a complex problem even to the most skillful and informed.

We have very lately decided a case upon the principle of the power of the State to prevent frauds and impositions. *Hutchinson Ice Cream Co.* v. *Iowa*, *ante*, p. 153. The principle applies as well to securities as to material products, the provisions of the law necessarily varying with the objects. As to material products the purpose may be accomplished by a requirement of inherent purity. The intangibility of securities, they being representatives or purporting to be representatives of something else, of property, it may be, in distant states and countries, schemes of plausible pretensions, requires a difference of provision and the integrity of the securities can only be assured by the probity of the dealers in them and the information which may be given of them. This assurance the State has deemed necessary for its welfare to require; and the requirement is not unreasonable or inappropriate. It extends to the general market something of the safeguards that are given to trading upon the exchanges and stock boards of the country, safeguards that experience has adopted as advantageous. Inconvenience may be caused and supervision and surveillance, but this must yield to the public welfare; and against counsel's alarm of consequences, we set the judgment of the State.

We turn back, therefore, to consider the more specific objections to the law. The basis of them is, as we have seen, the power conferred upon the commissioner, which is

asserted to be arbitrary. The objection is somewhat difficult to handle. It centers in the provision that requires the commissioner, as a condition of a license, to "be satisfied of the good repute in business of such applicant and named agents," and in the power given him to revoke the license or refuse to renew it upon ascertaining that the licensee "is of bad business repute; has violated any provision of this act or has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions." It is especially objected that as to these requirements no standard is given to guide or determine the decision of the commissioner. Therefore, it is contended that the discretion thus vested in the commissioner leaves "room for the play and action of purely personal and arbitrary power."

We are a little surprised that it should be implied that there is anything recondite in a business reputation or its existence as a fact which should require much investigation. If in special cases there may be controversy, those cases the statute takes care of; an adverse judgment by the commissioner is reviewable by the courts. Section 6373-8. So also as to the other judgments.

Besides it is certainly apparent that if the conditions are within the power of the State to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissions are instances. But the contention may be answered by authority. In *Gundling* v. *Chicago*, 177 U. S. 183, an ordinance of the City of Chicago was passed on which required a license of dealers in cigarettes and as a condition

of the license that the applicant, if a single individual, all of the members of the firm, if a co-partnership, and any person or persons in charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained. To this case may be added *Red "C" Oil Manufacturing Co.* v. *North Carolina*, 222 U. S. 380, 394, and cases cited; *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230; *Brazee* v. *Michigan*, 241 U. S. 340, 341. See also *Reetz* v. *Michigan*, 188 U. S. 505; *Lieberman* v. *Van De Carr*, 199 U. S. 552.

The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review we must accord to the commissioner a proper sense of duty and the presumption that the functions entrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 545); and, as we have said, in cases where there can be a dispute of fact, the statute provides for judicial review, and we see no legal objection to the designation of a particular court for such review.

We are not disposed to give serious attention to the contention that while the statute in form prohibits sales "it at the same time necessarily prevents purchases, and thereby shields contemplating purchasers from loss of property by the exercise of their own defective judgment," and puts them as well as the sellers under guardianship. If we may suppose that such purchasers would assert a liberty to form a "defective judgment" and resent means of information as a limitation of their freedom, we must wait until they themselves appear to do so. Besides, there are examples in legislation of unsolicited protection, and there is much in the business we are con-

sidering which urges to an imitation of the examples. It is not wise to put out of view the tendencies of the business and that it tempts to and facilitates speculative judgments, if the purpose be trading, improvident judgments, if the purpose be investment. Whatever detriment may come from such judgments the law may be powerless to prevent; but against counterfeits of value the law can give protection, and such is the purpose of the statute under review. It must be judged of upon that consideration, not upon the assertion of an absolute liberty of conduct which does not exist.

Discriminations are asserted against the statute which extend, it is contended, to denying appellees the equal protection of the laws. Counsel enumerates them as follows:

"Prominent among such discriminations are between the cases where more or less than fifty per cent. of an issue of bonds is included in the sale to one person; between securities which have and which have not been authorized by the public service commission of this state; between the securities issued by a bank, trust company, a building and loan association organized under the laws of this state and those which are not; between an *owner* who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company who sells at a commission of not more than two per cent. and one which sells at a higher commission; against securities when any part of the proceeds to be derived from the sale are to be applied in payment for patents, services, good will or for property not located in this state; in providing for such delays in the issuance of a license and in the subsequent conduct of business thereunder as to substantially hinder, and in many cases naturally arising, to utterly prevent sales; in discriminating between securities which have and which have not been published in regular market reports; be-

tween sales where in a single transaction the sale is for five thousand dollars or more; in discriminations against securities issued by taxing subdivisions of other states; between securities upon which there has and has not been a default as to principal or interest; against securities which have not from time to time for six months been published in the regular market reports or the news columns of a daily newspaper of general circulation in the state; where the securities are or are not of manufacturing or transportation companies in the hands of *bona fide* purchasers prior to March 1st, 1914, where such companies were, on that date and shall be at the time of the proposed sale, going concerns; between cases where the information contemplated is or is not contained in a standard manual of information approved by the commissioner; where the disposal is or is not made for a commission of less than one per cent. of the par value thereof by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted business in this state regularly open for public patronage as such; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid ninety per cent. of the price at which they are to be sold by him; where the securities are or are not those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which such securities are predicated are located within this state."

We cannot give separate attention to the asserted discriminations. It is enough to say that they are within the power of classification which a State has. A State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does

not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160. The cases were cited from which those propositions were deduced. To the same effect is *Armour & Company* v. *North Dakota*, 240 U. S. 510, 517.

The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore contravenes the commerce clause of the Constitution of the United States. There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. So much is a truism; there can only be controversy about its application. The language of the statute is: "Except as otherwise provided in this act, no dealer shall, *within this state*, dispose" of certain securities "issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit) . . . without first being licensed so to do as hereinafter provided."

The provisions of the law, it will be observed, apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed (§§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall

be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally. *Hatch* v. *Reardon*, 204 U. S. 152; *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *Engel* v. *O'Malley*, 219 U. S. 128; *Brodnax* v. *Missouri*, *id.* 285; *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Savage* v. *Jones*, 225 U. S. 501; *Standard Stock Food Co.* v. *Wright*, *id.* 540; *Trading Stamp Cases*, *supra*. With these cases *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, and the *Lottery Case*, 188 U. S. 321, are not in discordance.

We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the State? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the State. We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the State? Is there no point of time at which the State can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual trans-

portation, subjected to the jurisdiction of the State only when they are attempted to be sold to the individual purchaser? The questions are pertinent, the answer to them one way or the other, of consequence; but we may pass them, for regarding the securities as still in interstate commerce after their transportation to the State is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute.

Decree reversed and the cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE MCREYNOLDS dissents.